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No. 69-5001

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1969

No. [redacted]

LYMAN A. MOORE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioner Lyman A. Moore prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois affirming his conviction and death sentence.

REFERENCE TO REPORTS OF OPINIONS.

People v. *Moore*, 42 Ill. 2d 73, 246 N.E. 2d 299, is attached as an Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS.

The judgment of the Supreme Court of Illinois was entered on January 29, 1969. A timely petition for rehearing filed on February 19, 1969, was denied on March 25, 1969. Jurisdiction of this Court is invoked under Title 28, USC, sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW.

1. Petitioner was sentenced to death for murder. Six items of exonerating evidence were not disclosed to him at trial. The court below affirmed on the ground that the prosecution's duty to disclose exonerating evidence depends upon a request; that the prosecutor had shown his entire file to defense counsel at trial and no further request for disclosure was made. None of the exonerating items was contained in said file. Trial defense counsel were ignorant of the existence of the suppressed information.

Questions presented are:

(a) Whether a request is an indispensable prerequisite to disclosure of exonerating evidence by the State?

(b) Whether material evidence favorable to an accused should be disclosed by the State without a request where such evidence is not recorded?

(c) Whether denial of due process of law is contingent upon a request where a State knowingly permits false testimony to remain uncorrected?

(d) Where a prosecutor shows his entire file to defense counsel at trial, but none of the exonerating

items of evidence are contained in said file, does that satisfy the prosecution's duty of disclosure?

(e) Whether nondisclosure of the prosecuting police department is imputable to the prosecution?

2. Two witnesses made in-court identifications of the petitioner as the assailant. During cross examination, defense counsel sought to elicit the circumstances under which the witnesses first identified the accused. Prosecution objections were sustained on the ground that the questions went "beyond the examination in chief."

The questions presented are whether such restriction of cross examination

(a) denied the petitioner his constitutional right of confrontation under the Sixth Amendment?

(b) precluded the petitioner from exploring the admissibility of the in-court identification under *Stovall* v. *Denno*, 388 U.S. 293?

3. The deceased was killed with a twelve-gauge shotgun. The Chicago Scientific Crime Detection Laboratory determined that he was killed with a twelve-gauge shotgun. (A. 139.) The prosecutor stated in a Bill of Particulars that the murder weapon was a twelve-gauge shotgun. (A. 2.)

Over objection (A. 81-94), the prosecution introduced a sixteen-gauge shotgun into evidence. (A. 94.) The sixteen-gauge shotgun did not belong to the petitioner, was not recovered from him, and was never in his possession or control. (A. 58, 66-71.)

During closing argument the prosecutor told the jury that the sixteen-gauge shotgun was not the weapon that killed the deceased, but that any man who was with an-

other man who had the shotgun and shells for it was the type of person that deserved the death penalty. (A. 191-201, 204-206.)

The question presented is whether the introduction and use of such evidence, totally unconnected with the petitioner or the crime charged, denied the petitioner a fair trial?

4. Eight veniremen were removed for cause when they voiced general objections to capital punishment or stated that they had religious or conscientious scruples against the death penalty in a proper case.

In the light of *Witherspoon* v. *Illinois*, 391 U.S. 510, may a state court of review affirm a death sentence,

(a) on the ground that the tenor of *voir dire* examination was unlike that of *Witherspoon*?

(b) on the ground that the prosecution had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon*?

CONSTITUTIONAL PROVISIONS INVOLVED.

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . be confronted with the witnesses against him . . . have the assistance of counsel for his defense."

Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life . . . without due process of law; . . ."

STATEMENT OF THE CASE.

At 10:00 P.M. on April 25, 1962, a bartender in Lansing ejected a profane customer from his tavern. (A. 25-26, 118-119.) At 10:55 P.M. that customer returned and shot him in the heart with a twelve-gauge shotgun. (A. 2, 26, 139.) Two days later, a man known only as "Slick" bragged that he had shot the bartender in Lansing. (A. 351.)

At the trial twenty-five months later, Patricia Hill, a waitress, identified your petitioner as the ejected customer who returned to the tavern and shot the bartender. (A. 25-26.) On cross examination defense counsel sought to elicit the circumstances under which she first identified the petitioner, but prosecution objections were sustained on the ground that the questions went "beyond the examination in chief." (A. 28, 31.) Henley Powell identified the petitioner as the man who came into the tavern and shot the bartender. Powell had not been in the tavern when the customer was ejected. (A. 32.) Similarly, objections to the efforts of the defense to ascertain the circumstances of the initial identification of the petitioner by Henley Powell were sustained. (A. 38.)

A prosecution witness named Virgle Sanders identified the petitioner as the man known only as "Slick" who had bragged two days after the murder that he had shot a bartender in Lansing. (A. 44, 47.) A written statement that Virgle Sanders had given to the Lansing Police (A. 351) was *not* turned over to defense counsel for use on cross examination. (A. 41-50, 326-327, App. 14a-15a, 17a.)

Over objection, a sixteen-gauge shotgun was admitted in evidence (A. 81-94.) and used against petitioner. (A. 191-201, 204-206.) It was totally unconnected with the petitioner or the crime charged. (A. 58, 66-71.)

The defense presented the testimony of one Donald O'Brien who testified that petitioner was *not* the man ejected grom Zitek's tavern. (A. 114-116.) The head bartender and the general manager of Westmoreland Country Club in Wilmette, both testified, and the employment records of the Club showed, the petitioner was employed as a cocktail waiter until after midnight on the night of the murder. (A. 96-97, 99-103, 106-113.) Petitioner was paid overtime for that work. (A. 99, 106, App. 13a.)

Petitioner was found guilty (A. 218) and was sentenced to death. (A. 220.)

At a post-conviction hearing in January, 1967, it was shown that the Lansing Police and/or the prosecution had concealed six items of exonerating evidence from petitioner at trial:

1. Virgle Sanders' written statement to the Lansing Police which showed that he first met the man known as "Slick" on or about November 1, 1961, in Wanda and Del's tavern. (A. 351.)

   (Lyman Moore was in a federal penitentiary from February 18, 1957 until March 4, 1962. (A. 354.) When confronted at the post-conviction hearing with the fact that petitioner had been incarcerated in a federal penitentiary until March 4, 1962, Sanders admitted that it was *impossible* that petitioner was the man known only as "Slick" who had bragged that he had shot the bartender. (A. 296).)

2. The same night that the Lansing Police obtained Virgle Sanders' written statement they raided Wanda and Del's tavern looking for "Slick". Delbert Jones, the owner of Wanda and Del's told them that he knew and could identify "Slick". (A. 254.)

(Six months later when petitioner Lyman Moore was arrested (A. 58), the Lansing Police did *not* contact Delbert Jones for the purpose of having him view petitioner and identify him as the man known only as "Slick". (A. 255.).)

3. Right after Virgle Sanders supplied the name "Slick", the Lansing Police had an immediate suspect, James E. "Slick" Watts. A photograph of "Slick" Watts was contained in their file. (A. 275.) Chief Braschler assigned Lt. Turbin to look for "Slick" Watts. (A. 346.)

4. After petitioner Lyman Moore was arrested on October 31, 1962. (A. 58), the Lansing Police photographed him and took said photograph (A. 272, 361) to the home of William Leon Thompson. (A. 251.) William Leon Thompson used to patronize Wanda and Del's tavern in the autumn of 1961. He knew the owner of Wanda and Del's, Delbert Jones, and Virgle Sanders, and also knew and could identify the man known only as "Slick". He told Lt. Turbin and Sergeant Vandernoord of the Lansing Police that Lyman Moore did not resemble "Slick". (A. 255, 267, 273, 278.)

5. When Virgle Sanders first saw petitioner Lyman Moore at trial some twenty five months after the man known only as "Slick" had bragged that he had shot Bernie Zitek, he said to the Lansing Police officers in the presence of the prosecutors, "The guy

that I knew as 'Slick' looked to be about 30 or 40 pounds heavier than this guy." (A. 294.) The Lansing Police officers said, "Well, you know how those jail-house beans are." (A. 295.)

6. The Lansing Police file contained a diagram, drawn by a Lansing officer, that would have contradicted the prosecution witness Henley Powell and corroborated the defense witness Donald O'Brien; it showed Henley Powell seated with his back to the entrance through which the assailant entered. (A. 244-245, 260-261, 340-341, 357-358, 360.)

On appeal, the majority of the court below affirmed petitioner's conviction and death sentence but did not mention the unrebutted alibi evidence of two witnesses corroborated by work records; the majority held that the prosecution's duty to disclose exonerating evidence depends upon a request; that the prosecutor had shown his entire file to defense counsel during trial and no further request for disclosure was made (App. 7a.); that cross examination had not been restricted; that the sixteen-gauge shotgun had been properly admitted in evidence. (App. 4a.) *Sua sponte,* it held that *Witherspoon* v. *Illinois,* 391 U.S. 510, is not controlling at bar. (App. 8a-11a.)

On petition for rehearing, petitioner pointed out from the Record that the exonerating evidence was not contained in the prosecutor's file; that trial defense counsel were ignorant of the existence of the suppressed exonerating evidence, and could not reasonably be expected to request something that they did not know existed. (Pet. Reh. pp. 2-18); that the court had ignored his unrebutted

alibi evidence (Pet. Reh. p. 18); and that cross examination had been restricted. (Pet Reh. p. 19.) Petitioner attached to his petition for rehearing as an Appendix the *voir dire* examination of twelve prospective jurors, eight of whom had been removed for cause in violation of *Witherspoon* standards. (Pet. Reh. App. 1a-7a.)

Mr. Justice Walter V. Schaefer dissented on the grounds: (1) that the State had failed to prove the petitioner guilty beyond a reasonable doubt; (2) that a request is not an indispensable prerequisite to disclosure by the prosecution; that the duty of the prosecution to disclose exonerating evidence cannot be made contingent upon a request when the defense is ignorant of the existence of the suppressed information; that the suppressed exonerating evidence was not shown to be contained in the prosecutor's file; that nondisclosure denied petitioner fundamental fairness; that prejudice to the petitioner was identical whether the evidence was withheld by the prosecution or the police; (3) that the petitioner's right of cross examination had been restricted; (4) that a sixteen-gauge shotgun was improperly admitted in evidence since the prosecution had in its possession throughout the trial ballistic test results that showed that the deceased had been killed with a twelve-gauge shotgun and thus the sixteen-gauge shotgun was unsuitable for the commission of the homicide at bar.

The majority and dissenting opinions are attached hereto as an Appendix.

Execution of the death sentence has been stayed pending this Court's ruling upon the instant petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT.

Petitioner is under sentence of death for a murder that he could not have committed. But, the constitutional issues presented by the facts of record at bar reach far beyond the fate of this individual petitioner. If this conviction is permitted to stand, it will serve as an open invitation to police and prosecutors to treat a murder case as a sporting event, to hide exonerating evidence from any accused secure in the knowledge that if the accused does not request suppressed information that he does not know exists there is no duty to disclose it.

We come here now not for the purpose of seeking to extend the State's duty to disclose exonerating evidence, but merely to exact the promise of fundamental fairness that it holds forth.

1.

FAILURE OF THE STATE TO DISCLOSE SIX ITEMS OF EXONERATING EVIDENCE TO PETITIONER AT TRIAL DENIED HIM A FAIR TRIAL AND DUE PROCESS OF LAW.

Petitioner was sentenced to death for murder. (A. 220.) Six items of exonerating evidence were not disclosed to him at trial. (A. 58, 244-245, 251, 254-255, 260-261, 267, 271, 273, 275, 278, 283, 291, 293-296, 336-337, 340-341, 348, 351, 354, 357-358, 360.)

The court below affirmed petitioner's conviction and death sentence on the ground that none of the items concealed were requested by petitioner during trial, and that:

> "The record discloses that the assistant State's Attorney at the trial showed his entire file to the defense attorney and no further request for disclosure was made." (App. 7a.)

However, none of the exonerating items were contained in said prosecutor's file. (A. 244-245, 254-255, 266-267, 283, 291, 293-296, 320-324, 346, 366.) Trial defense counsel were ignorant of the existence of the suppressed information (A. 306-307, 310-311, 326-329), and could not reasonably be expected to make a request for evidence they did not know existed.

A. A Request Is Not An Indispensable Prerequisite To Disclosure Of Exonerating Evidence By The State.

Mr. Justice Walter V. Schaefer dissented in the case at bar. On this particular point, he stated:

> ". . . despite the language in *Brady* v. *Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, I do not believe that the Supreme Court intended to establish a request as an indispensable prerequisite to disclosure by the prosecution. Prior to *Brady* many courts had recognized the duty of the prosecution to disclose favorable, material evidence to the defense. And in many of those cases the defense did not know of the evidence and so had failed to request it. (*Mooney* v. *Holohan*, 294 U.S. 103, 79 L. Ed. 791; 55 S. Ct. 340; *Pyle* v. *Kansas*, 317 U.S. 213, 87 L. Ed. 214, 63 S. Ct. 177; *United States* v. *Dye* (3d cir. 1955), 221 F. 2d 763; *United States* v. *Baldi* (3d cir. 1952), 195 F. 2d 815.) In *Brady* the Supreme Court acknowledged the long-standing duty that rested upon the prosecution. In doing so, it used language appropriate to the decision of the case before it. Without an explicit holding to the contrary, I cannot believe that the Supreme Court intended to narrow the duty of the prosecution as it had existed prior to *Brady* by making that duty contingent upon a request when the defense is ignorant of the existence of the suppressed information. Essential fairness, rather than the ability of counsel

to ferret out concealed information, underlies the duty to disclose. *Brady* v. *Maryland,* 373 U.S. 83, 10 L. Ed. 215, 83 S. Ct. 1194; *Barbee* v. *Warden, Maryland Penitentiary* (4th cir. 1964), 331 F. 2d 842; *United States* v. *Wilkins* (2d cir. 1964), 326 F. 2d 135." (App. 17a-18a.)

B. Material Evidence Favorable To An Accused Should Be Disclosed Without A Request Where Such Evidence Is Not Recorded.

Four of the six items of exonerating evidence were not even *recorded.* (A. 254-255, 346, 266, 294-295.)

Certainly as regards 4 items of unrecorded exculpatory evidence, the defense could not reasonably have been expected to request them. "If the defense does not know of the existence of the evidence, it may not be able to request its production." (*Giles* v. *Maryland,* 386 U.S. 66, at page 102, concurring opinion.)

Without exception, the federal courts of appeals that have interpreted *Brady* have held that the duty to disclose favorable evidence does not turn upon a request. It seems to us that the underlying policy consideration is the awesome disparity between the State's investigative machinery and that of an individual accused. Therefore, it seems to us that the majority opinion below is legally unsound.

C. Where A Prosecutor Shows His File To Defense Counsel, But None Of The Suppressed Information Is Contained In Said File, That Does Not Satisfy The State's Duty Of Disclosure.

Moreover, we submit that a defense counsel who looks at a prosecutor's file should be able to rely upon the inarticulated representation that everything material or

relevant to the case is contained in that file. If exonerating information is not contained in the prosecutor's file, the defense is misled. (Cf. *Jackson* v. *Wainwright*, 390 F. 2d 288, 298.)

D. Only By Ignoring The Indisputable Facts Of Record At Bar Could The Majority Hold That There Was No Request.

Not only did Mr. Justice Schaefer dissent on the ground that nondisclosure denied this petitioner the fundamental fairness guaranteed by the constitution, citing *Brady* v. *Maryland*, 373 U.S. 83 and *United States* v. *Wilkins*, 326 F. 2d 135, but he commented further:

> "The majority, however, disposes of this issue upon the ground that the defendant failed to request the evidence which was suppressed. This ground is neither factually nor legally sound. Prior to the trial the defendant had demanded copies of the grand jury minutes and of all statements made to the Lansing police. The motion was allowed only to the extent of providing the defendant with the statement of each witness who testified at the close of his direct examination. No statement of Virgle Sanders was supplied. Although, as the majority points out, the prosecuting attorney offered his file to the defense at the trial, that attorney was unable to recall whether the items here involved were in that file. The defendant's attorney testified that none of these items was disclosed to him." (App. 17a.)

On Monday, November 18, 1963, six months prior to the trial, the defense filed a formal written motion demanding a copy of the grand jury minutes and any and all written statements in the possession of the Lansing Police taken from complaining witnesses or any other witnesses subsequent to the offense set out in the indict-

ment. (A. 5.) What more could defense counsel request? Should he have asked for any and all information that the police and the prosecutors intended to suppress? Must any accused assume that the police and the prosecution will suppress anything not requested? Is the burden upon the accused to assume that the State will ignore Canon 5?

E. The Six Items Of Concealed Evidence Would Have Been Favorable And Material To The Defense.

Six items of exonerating evidence were concealed from the petitioner at the trial. They were brought to light at various times subsequent to the trial, and were formally established in the record at a post-conviction hearing on January 11th and 12th, 1967.

Five of the items of exonerating evidence directly and indirectly concern the prosecution witness Virgle Sanders. Virgle Sanders testified at the trial that the petitioner Lyman Moore was the man that he knew only as "Slick"; that on April 27, 1962, at 2:30 P.M., he saw him in the Ponderosa Tap in Dolton (A. 41-42.) at which time he said, "Hey Virgle, it's open season on bartenders. I shot one in Lansing Wednesday night". (A. 44, 47.)

The five items are as follows:

(1) On April 30, 1962, at 8:50 P.M., Virgle Sanders gave a written statement to the Lansing Police in which he stated that he had first met "Slick" "about six months ago." (A. 351.)

(The significance of that statement is the petitioner Lyman Moore was in federal prison at that time. The Lansing Police received an F.B.I. report in November, 1962 (A. 241), that showed Lyman

Moore in a federal penitentiary from February 18, 1957, until March 4, 1962. (A. 354.)

Petitioner's written pretrial demand for a copy of all statements made to the Lansing Police (A. 4-9.) was denied on the representation of the prosecutor that all statements of prosecution witnesses would be supplied to the defense after the direct examination of each. (A. 7-9.)

Copies of written statements to the Lansing Police of prosecution witnesses Hill and Powell were supplied to the defense at the close of their direct examinations. (A. 28, 33.) But, Virgle Sanders' written statement was *not* supplied to the defense for cross examination (A. 47-50, 326-327, App. 12), in spite of the *trial* prosecutor's representation that it would be supplied. (A. 7-9.)

At the post-conviction hearing on January 11, 1967, Virgle Sanders testified definitely that he saw the man that he knew as "Slick" in Wanda and Del's tavern before Christmas of 1961. (A. 295.) When confronted with the fact that the petitioner Lyman Moore had been incarcerated in a federal penitentiary until March 4, 1962, he admitted that it was *impossible* for Lyman Moore to be the man that he knew as "Slick" who two days after the murder had bragged that he had shot the bartender in Lansing. (A. 296, App. 15a.).)

(2) On April 30, 1962, shortly after Virgle Sanders had given his written statement to the Lansing Police, the Lansing Police raided Wanda and Del's tavern in Chicago, looking for "Slick". The owner-bartender, Delbert Jones, told them that he knew and could identify the man known as "Slick". (A. 254.)

(Six months later, when the petitioner Lyman Moore was arrested (A. 78), the Lansing Police did *not* contact Delbert Jones for the purpose of having him view the petitioner to identify him as the man known as "Slick". (A. 255, 336-337.)

At the post-conviction hearing, Delbert Jones identified a photograph of James E. Watts (A. 274, 362) as the man known as "Slick" that used to come into his tavern in the autumn or fall of 1961. (A. 332, 334-335.) He also testified that he was shown a photograph of Lyman Moore and said he was not "Slick". (A. 333.) He saw Lyman Moore in person in the Cook County Jail on December 23, 1964, and said that he was not "Slick". (A. 337.)

A prosecution objection on the ground that defense counsel was not permitted to prove the petitioner innocent in a post-conviction hearing was sustained (A. 337), and Delbert Jones' testimony was stricken en toto. (A. 338.).)

(3) May 1, 1962, or shortly thereafter, the Lansing Police had an immediate suspect, James E. "Slick" Watts. They had a photograph of "Slick" Watts in their file on the Zitek murder case. (A. 275.) Chief Braschler assigned Lt. Turbin to look for "Slick" Watts. (A. 346.)

(The photograph was discovered after the post-conviction petition was filed. (A. 335.) The fact that Chief Braschler considered James E. "Slick" Watts such a good suspect that he assigned Lt. Turbin to "look for" him was not brought to light until January 12, 1967, when Chief Braschler testified in the post-conviction hearing. (A. 346.).)

(4) On November 1 or 2, 1962, the Lansing Police took a photograph of the petitioner Lyman Moore to the

home of William Leon Thompson. (A. 251, 272, 361.) William Leon Thompson used to patronize Wanda and Del's tavern in the autumn of 1961. He knew Delbert Jones, the owner of Wanda and Del's, and he knew Virgle Sanders. He also knew and could identify the patron of Wanda and Del's who was known only by his nickname "Slick". He told Lt. Turbin and Sergeant Vandernoord of the Lansing Police that Lyman Moore did not resemble "Slick". (A. 255, 267, 273, 278.)

(This visit to Thompson's home and his statement that Lyman Moore did not resemble "Slick" was not disclosed to the defense at trial; it was not even recorded. (A. 266.)

The Lansing Police had spoken to Thompson in the Ponderosa tavern three days after the homicide, at which time he told them that he had heard about the bragging incident by "Slick" on the previous afternoon. (A. 265, 281-284.) And the Lansing Police knew that Virgle Sanders, Delbert Jones, and William Leon Thompson all knew each other and that each knew "Slick". (A. 254, 283, 291, 293, 336.)

Delbert Jones, the owner of Wanda and Del's tavern, was never brought in to view Lyman Moore by the Lansing Police, nor was he shown the photograph of him that was shown to Thompson. (A. 336-337, 348.)

[Long after the trial, when Delbert Jones was shown the same photograph of Lyman Moore by defense counsel, and when he viewed Lyman Moore in person in the County Jail on December 23, 1964, he said that Lyman Moore was not "Slick". (A. 333, 337.).]

Virgle Sanders was not permitted to look at Lyman Moore until May 13, 1964, over two years later, when he was brought to court to testify at the trial. (A. 294.).)

(5) On May 13, 1964, when Virgle Sanders was brought to court to testify at the trial, when he first saw Lyman Moore he said to Lt. Turbin and other Lansing police officers, in the presence of the prosecutors, "The guy that I knew as 'Slick' looked to be about 30 or 40 pounds heavier than this guy." (A. 294.) The Lansing police officers said, "Well, you know how those jailhouse beans are." (A. 295.)

(The fact of actively encouraging Virgle Sanders to falsely identify the petitioner as "Slick" was never recorded in any file. It was not revealed to the defense at trial; it first came to light on June 12, 1965 (A. 291); and it was formally established in the record on January 11, 1967, at the post-conviction hearing. (A. 294-295.).)

The sixth item of exonerating evidence concerned the prosecution witness Henley Powell, who testified that he was playing pinochle with Donald O'Brien and two other men in Zitek's tavern at the time of the shooting; that he saw the shooting because he was seated facing the bartender with a view of the entrance. (A. 32, 34.)

Donald O'Brien, a defense witness, testified that Henley Powell was seated with his back to the entrance, looking towards the other end of the tavern. (A. 120.)

(6) The Lansing Police file contained a diagram, drawn by a Lansing police officer, which diagram contradicts the prosecution witness Henley Powell and corroborates the defense witness Donald O'Brien; it shows

Henley Powell seated with his back to the entrance through which the assailant entered. (A. 244-245, 260-261, 340-341, 357-358, 360.)

(At the post-conviction hearing the prosecutor did not recall ever having seen said diagram. (A. 327.) Both defense counsel testified that said diagram was not supplied to them at the trial. (A. 307, 328.)

The diagram first came to light some time subsequent to April 29, 1966 (A. 239) and was admitted in evidence at the post conviction hearing on January 11, 1967. (A. 244-245.) It shows that Henley Powell was seated with his back to the entrance through which the assailant entered. (A. 357-358, 360.).)

F. Nondisclosure Of Material Evidence Favorable To The Accused By The Prosecuting Police Department Is Imputable To The Prosecution.

The court below seemed to recognize that much of the exonerating evidence was concealed by the Lansing Police not only from the petitioner but also from the prosecutors:

> "... it does not appear that any error in the testimony was known to the prosecution." (App. 8a.)

However, we submit that the correct view regarding the denial of this petitioner's federal constitutional rights is expressed by Mr. Justice Schaefer in his dissenting opinion:

> "... the prejudice to the defendant is identical whether the evidence is withheld by the prosecutor or by the police." (App. 18a, citing *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842.)

G. Where A State Knowingly Permits False Testimony To Remain Uncorrected, That Is A Denial Of Due Process Of Law Regardless Of Whether There Was Any Prior Request.

On appeal petitioner argued that the State had suffered false testimony to remain uncorrected. The court below recognized the fact that Powell was mistaken as to which direction he was facing at the time of the homicide but held, "Such contradictions in testimony go to the weight of the evidence and do not in any way indicate perjury." (App. 8a.)

The fallacy to that kind of reasoning is that after twenty-five months Henley Powell might have honestly believed what he testified to, but the Lansing Police knew better because of the diagram in their file that showed he was mistaken or lying. And the jury had no opportunity to *weigh* the diagram that contradicted Powell and corroborated O'Brien. See, *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842.

The court below missed the thrust of *Alcorta* v. *Texas,* 355 U.S. 28, *Napue* v. *Illinois,* 360 U.S. 264, and *Miller* v. *Pate,* 386 U.S. 1, when it held:

> "Sanders testified that the defendant was the man he knew as 'Slick'. Even though it appears that he said he had met Slick at a time that Moore was in fact in prison, and that other people did not know Moore as 'Slick', and the fact that Sanders had first stated that the man he knew as 'Slick' was about 30 or 40 pounds heavier than Moore does not indicate perjury, but mere testimonial inconsistency." (App. 8a.)

The jury that sat in judgment of this petitioner was not permitted to hear one word of the "mere testimonial inconsistency", because the police *and* the prosecutors

who had concealed it from the jury did *not* bring it to the attention of the jury.

The test to be applied in such cases is whether the testimony may have had an effect on the outcome of the trial. Even the dissenting opinion in *Giles* v. *Maryland*, 386 U.S. 66, at page 116, agrees that that is the standard:

> "The Court has held since *Mooney* v. *Holohan*, 294 U.S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406, that a State's knowing use of perjured testimony denies a fair trial to the accused. Mooney has been understood to include cases in which a State knowingly permits false testimony to remain uncorrected. *Alcorta* v. *Texas*, 355 U.S. 28, 2 L. ed. 2d 9, 78 S. Ct. 1173. The standard applied in such cases has been whether the testimony 'may have had an effect on the outcome of the trial.' *Napue* v. *Illinois*, supra, 360 U.S. at 272, 3 L. ed. 2d at 1223. These cases were very recently followed and applied in *Miller* v. *Pate*, 386 U.S. 1, 17 L. ed. 2d 690, 87 S. Ct. 785."

H. What Kind Of A Trial Would The Jury Have Heard If All Of The Undisclosed Evidence Had Been Presented?

Patricia Hill would have made her in-court identification of the defendant as the man who was ejected from Zitek's Tavern at 10:00 P.M. and who returned at 10:55 P.M. and shot Bernie Zitek in the heart with a shotgun. (A. 25-26)

Henley Powell would have made an in-court identification of the defendant as the assailant. (A. 32-33.) But, evidence would have been introduced in the form of a diagram drawn by a Lansing police officer on the night of the homicide to show that he was sitting with his back

to the entrance, indicating that he could not have seen the killing. (A. 260-261, 340-341.)

Virgle Sanders would have testified as he did that he knew the defendant sitting in Court; that he knew him only by the nickname "Slick"; that he saw him in the Ponderosa Tap in Dolton on April 27, 1962, at 2:30 or 3:00 P.M. (A. 41-42); that the defendant said, "It's open season on bartenders. I shot a bartender in Lansing." (A. 47.)

On cross examination it would have been shown that the first time that Sanders was asked to view the defendant was that day in court; that when he first saw him he said that the guy he knew as Slick looked to be about 30 or 40 pounds heavier than the defendant; that the Lansing police said, "Well, you know how those jailhouse beans are." (A. 295.) It would have been established that Delbert Jones, the owner of Wanda and Del's tavern, knew Sanders and "Slick" and also William Leon Thompson. The witness would have been asked to verify the fact that he first met "Slick" in Wanda and Del's before Christmas of 1961. (A. 295.) He would have been shown the F.B.I. report indicating that Lyman Moore was in federal prison in Leavenworth, until March 4, 1962, and he would have replied as he did in the post-conviction hearing, "If he's in jail, it would have been impossible to be the same man." (A. 296.)

Chief Braschler would have been called to testify that the Lansing police had an immediate suspect by the name of Slick Watts, James E. "Slick" Watts; that he had assigned Lt. Turbin to "look for" Slick Watts. (A. 346.)

Delbert Jones would have been called to testify that he knew a man called "Slick" that used to frequent his tavern Wanda and Del's; that the defendant in court

was not the man called "Slick". (A. 337.) He would have been shown a photograph of James E. Watts and would have testified that Watts was the man called "Slick". (A. 334.)

William Leon Thompson would have been called to testify that he knew Virgle Sanders (A. 271), Delbert Jones, the owner of Wanda and Del's tavern, and a man called "Slick" that used to frequent that tavern. He would have been asked to look at the defendant in court and he would have testified that the defendant was not the man that he knew as "Slick". (A. 273.) He would have been shown a photograph of James E. Watts, and he would have testified that Watts was the man he knew as "Slick". (A. 274, 275, 276, 277.)

Then, Donald O'Brien would have been called to testify as he did that he heard the shot but did not see the assailant; but that the defendant was definitely not the man that Bernie Zitek had ejected at 10:00 P.M. (A. 117.)

In addition to all that of course there would be presented the testimony of two disinterested respectable alibi witnesses who would have testified as they did that the defendant was at work over fifty miles away at the time of the crime. (A. 96, 106.) The alibi was corroborated by work records. (A. 99, 106, 109, 113.)

Had the jury heard all the evidence, including the evidence that was not disclosed, it may have found the petitioner not guilty.

Mr. Justice Schaefer concluded from the trial record alone, even without the exculpatory evidence that was not discovered, that the State had failed to prove the petitioner guilty beyond a reasonable doubt. (App. 13a-14a.)

2.

IT IS AN UNCONSTITUTIONAL RESTRICTION OF CROSS EXAMINATION TO PRECLUDE AN ACCUSED FROM ELICITING THE CIRCUMSTANCES UNDER WHICH IDENTIFYING WITNESSES FIRST IDENTIFIED HIM.

At the trial twenty-five months after the murder, a waitress named Patricia Hill identified the petitioner Lyman Moore as the ejected customer who returned to Zitek's tavern and shot the bartender. (A. 25-26.) During cross examination, defense counsel sought to elicit the circumstances under which Patricia Hill first identified the petitioner, but prosecution objections were sustained on the ground that the questions went "beyond the examination in chief." (A. 28, 31.)

Henley Powell identified the petitioner as the man who came into the tavern and shot the bartender. Powell had not been in the tavern when the customer was ejected. (A. 32.) Similarly, objections to the efforts of the defense to ascertain the circumstances of the initial identification of the petitioner by Henley Powell were sustained. (A. 37-38.)

Mr. Justice Schaefer said in his dissenting opinion, the rulings restricting cross examination and precluding inquiry into the circumstances of the initial identification of petitioner by Patricia Hill and Henley Powell were erroneous, because "the circumstances of an identification clearly relate to its weight." (App. 13a.)

What good is the right of confrontation if an accused is foreclosed from inquiring on cross examination into the circumstances of the initial identification to explain, modify or discredit the in-court identification? And that is precisely what happened to this petitioner; he was fore-

closed: "Objection sustained. Don't refer to that anymore." (A. 31.)

The restriction of cross examination in the case at bar is not merely academic. The record shows that Patricia Hill attended two lineups in which the petitioner Lyman Moore appeared on two successive days. Petitioner was arrested in Chicago on October 31, 1962, at 5:30 A.M. (A. 78.) and taken to the Burnside police station. (A. 71.) Patricia Hill attended a line-up at the Burnside police station on the night of October 31, 1962. (A. 31, 145.) The record does *not* reflect that she identified the petitioner at that line-up. Indeed, why did the prosecution object to inquiry into that line-up?

The very next day, November 1, 1962, Patricia Hill viewed a second line-up at the Burnside police station, in which the petitioner appeared. She was accompanied by Donald O'Brien and five other male patrons of Zitek's tavern. None of those six men identified the petitioner Lyman Moore. (A. 116.) Why was it necessary to bring Patricia Hill to *two* line-ups? Is it not reasonable to infer that the results of the first line-up were unsatisfactory to the police?

Numerous questions suggest themselves. Who notified Patricia Hill to come to the Burnside police station in Chicago? What was said to her at the time of notification? How did she get to the Burnside police station? Who was with her? What was said to her? Did she identify the petitioner as the assailant that night? What did she say? To whom? What was said in return? How did she get home from the station? Why did she return the following day? Who asked her to return the following day? What was said to her? Who were the five other

men beside Donald O'Brien (A. 116.) that accompanied her to that second line-up and failed to identify anyone in it? Were the same people in the second line-up?

Regarding Henley Powell: When was the first time he ever laid eyes on the petitioner after the shooting? What did he say? And, so on.

This line of inquiry was cut off at the threshold on the ground that it went "beyond the examination in chief." (A. 28, 31.) As your Honors said in *Smith* v. *Illinois*, 390 U.S. 129, 131:

> "To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross examination itself."

Moreover, the evil of foreclosing cross examination at the threshold goes beyond a question of weight; it precludes even questioning the admissibility of the in-court identification.

In some cases, judged by the "totality of circumstances," the conduct of pretrial confrontation procedures may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law. *Stovall* v. *Denno*, 388 U.S. 293, 302; *Foster* v. *California*, ... U.S. ....., 5 CrL 3001.

That right was also foreclosed.

Why was it necessary to bring Patricia Hill to two line-ups on successive days?

Was Henley Powell ever brought to a line-up in which the petitioner appeared? If not, why not?

This Court has seen fit to reverse even in the absence of prejudice where cross examination is restricted.

(*Brookhart* v. *Janis*, 381 U.S. 1, 3.) In the light of that case, *Pointer* v. *Texas*, 380 U.S. 400, and *Smith* v. *Illinois*, 390 U.S. 129, the facts of record at bar present an *a fortiori* case.

3.

WHERE THE DECEASED WAS KILLED WITH A TWELVE-GAUGE SHOTGUN, THE INTRODUCTION AND USE OF A SIXTEEN-GAUGE SHOTGUN TOTALLY UNCONNECTED WITH PETITIONER OR THE CRIME CHARGED, DENIED PETITIONER A FAIR TRIAL AND DUE PROCESS OF LAW.

The deceased was killed with a twelve-gauge shotgun. (A. 2, 139.)

A sixteen-gauge shotgun, totally unconnected with petitioner (A. 58, 66-71), was admitted in evidence over his objection. (A. 81-94.)

The prosecutor used that irrelevant evidence with devastating effect against petitioner. He told the jury that the sixteen-gauge shotgun was not the weapon that killed the bartender. But, he argued that any man who was with another man who had such a weapon and shells for it, was the type of person that deserved the death penalty. (A. 199-201, 204-206.)

The majority of the court below held:

> "There is no clear evidence of the weapon actually used in this homicide, although it is clear that it was a shotgun. We have consistently held that a weapon found upon a defendant suitable for the commission of the crime charged is proper evidence even though there is no showing that it was the actual weapon used. (Citing cases.)" (App. 4a.)

Mr. Justice Schaefer dissented on the ground that in the cases cited by the majority no ballistic evidence was

available, and therefore the suitability of the weapon could be established only by physical description, but that in the case at bar the prosecution had ballistic test results which showed that the bartender was shot with a twelve-gauge shotgun; that the sixteen-gauge shotgun was unsuitable for the commission of the murder. (App. 14a.) And, of course, Mr. Justice Schaefer is right. One could not get a twelve-gauge shotgun shell into a sixteen-gauge shotgun with a hydraulic press!

The dissenting opinion also pointed out that the sixteen-gauge shotgun was never in the possession or control of the petitioner. (App. 14a.) The record verifies that observation. It did not belong to the petitioner and was not recovered from him. It was recovered from a 1957 Ford automobile (A. 58, 66-71) owned by a man named Barbee. (A. 68.) The sawed-off barrel was recovered from Barbee's home. (A. 77.)

Since the prosecutor admitted that the sixteen-gauge shotgun was *not* the weapon that killed the bartender (A. 137-138, 200, 202, 204-205), the only reason it was introduced and used against petitioner was to denounce him as a bad man, without regard to his guilt of the crime charged. (A. 199-201, 204-206.)

This seems to be a case of first impression. We can find no case in which a weapon totally unconnected with the accused or the crime charged has been held admissible in evidence. The closest analogy that we can find is in cases involving prior convictions.

"While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising su-

pervisory power over criminal trial in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." (*Spencer* v. *Texas,* 385 U.S. 554, at 572-575, dissenting opinion, and cases cited therein.)

The case at bar presents an *a fortiori* situation. As the majority opinion in *Spencer* v. *Texas* points out, "under recidivist statutes, the jury learns of prior crimes committed by the defendant, but the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence. The defendant's interests are protected by limiting instructions, . . ." (385 U.S. 554, at 561.)

In the case at bar, there were no limiting instructions. Indeed, there could not have been any. Either the sixteen-gauge shotgun was relevant to the question of guilt or innocence of the crime charged, or it wasn't. The dissenting opinion holds, and the record shows, that it was not.

It is pure sophistry to hold that there is no clear evidence of *the weapon* actually used to this homicide (App. 4a.) when the prosecutor admitted that the sixteen-gauge shotgun was *not* the weapon used to kill the deceased. (A. 137-138, 200, 202, 204-205.)

It *was* used in an attempt to kill the petitioner.

In Illinois, a jury may impose a death penalty for any reason or for no reason. There are no rules or standards to guide the jury; it can select or reject a death penalty as it sees fit. (*Witherspoon* v. *Illinois,* 391 U.S. 510; *People* v. *Bernette,* 30 Ill. 2d 359, 370.)

Here are a few excerpts from the prosecutor's closing argument that demonstrate how he used the sixteen-gauge shotgun to obtain a death penalty verdict from the jury:

> Mr. Fleming: Now, he stated to you about the most important witness in this case is this shotgun. And he said this shotgun was found again in a car that was not owned by this defendant. But it was a car that this defendant—and again this man with the mustache were arrested getting in the automobile.
>
> They say this is a 16, which it is, it is a 16. And we stipulated that the pellets, if the expert would have testified that in his opinion they would have been from a twelve-gauge shotgun. He said because this is a 16 and because the pellets came from a twelve-gauge shotgun, really this is the most important thing in this case.
>
> We never contended and we don't now, and the evidence doesn't show it, that this is the shotgun that killed Bernard Zitek. He said, well, this is the thing and the reason why you should go back and find this man not guilty.
>
> Lyman Moore, I submit to you, is that type of defendant that knows when he shoots a bartender and kills that bartender, about the only way for him to get out of it is to toss the shotgun he shot the bartender with in a creek, bury it, burn it or something else, because he knows if he ever gets caught with that shotgun he is absolutely a goner.
>
> This is not the shotgun that killed Bernard Zitek, there is no question about it. But one thing we know from this shotgun being in that car—let me have those pellets—that the man with the mustache again

and Lyman Moore are those kind of people that use shotguns.

And take a look at those, folks, these are in evidence so you can look at them. You see this shell here, it has a ballbearing at the end of it. I wonder what they were going hunting for with this. Pheasants? You shoot deer with this in Wisconsin and Michigan. The other three are goose shot, number 4's. You shoot geese in Canada with that; you don't hunt pheasants in Illinois or target practice with these things, you kill things with this. There is a ballbearing at the end of this, and that is what was in this weapon when it was found in the car as Lyman Moore and this other man went to get into it. (A. 199-201.)

* * * * *

Is it the type of case where the person has a fight, —and when I say a fight, he uses abusive language at a bartender and the bartender, because he uses this abusive language, tells him he is going to get kicked out, is it reason enough for a man to come back with that shotgun or one like it, it wasn't this one it was one like it, and kill that person?

Is it reason enough to come back an hour later with the shotgun, a loaded shotgun, and kill that person? These are the things you take into consideration.

The next thing you take into consideration is when Moore came back at 11:00 o'clock, walked into the bar with a shotgun, they said it was a single barrel shotgun, cold-bloodedly placed the shotgun on the bar, aimed it at the bartender, pulled the trigger and then left. That is what he did.

Is this the type of case that deserves a recommendation of the death penalty? Take into consideration this, and this is in evidence. This is a shotgun, this is a sixteen-gauge shotgun. A twelve-gauge shotgun killed Bernie Zitek. Is the shotgun the most humane type weapon that if someone were to kill another person or shoot them, is this the type of weapon that you would say well, he didn't have the right to kill him but at least it was a clean death.

You heard Doctor Wagner testify. He testified that this—when I say "this" I am not referring to this specifically but a shot gun shell entered his right chest and all the beebees went all over and his heart exploded and that's why he died. Is this the way people should die? Is this the kind of case that deserves the death penalty? (A. 204-205.)

* * * * *

Is the death penalty the type of penalty that is appropriate for shotguns loaded with ballbearings? Is the death penalty appropriate in this type of case where a weapon such as this, not a pistol, not a revolver, an automatic or a rifle, not a club was used but a hard, cold shotgun that shoots a slug about the size of this. Is this the type of case?" (A. 206.)

Even if Illinois had rules or standards to guide a jury in determining whether to impose the death penalty, and regardless of the outcome of *Maxwell* v. *Bishop*, No. 622, now pending in this Honorable Court, we seriously doubt that Illinois could constitutionally enact a rule or standard that a jury could take into consideration a weapon not used in the commission of the offense charged which was found in the automobile of an associate or friend of the accused, even though the evidence

showed no access, possession or control of the weapon by the accused.

4.

THE DEATH SENTENCE IN THE CASE AT BAR CANNOT BE CONSTITUTIONALLY EXECUTED BECAUSE IT WAS IMPOSED BY A JURY FROM WHICH HAD BEEN REMOVED FOR CAUSE THOSE WHO, WITHOUT MORE, WERE OPPOSED TO CAPITAL PUNISHMENT OR HAD CONSCIENTIOUS SCRUPLES AGAINST IMPOSING THE DEATH PENALTY.

Apparently, in the absence of another clear expression by this Court, Illinois intends to apply the *Witherspoon* doctrine only to Witherspoon.

The court below held:

> "On *voir dire* in this case each juror was asked in substance: Do you have any religious or conscientious scruples against the infliction of the death penalty in the proper case? Twelve jurors positively asserted that they had such scruples and were excused for cause without motion by the State or objection by the defendant.
>
> The tenor of the entire examination, however, was unlike *Witherspoon* where the trial court promptly removed all who expressed the slightest qualms about capital punishment." (App. 8a-9a.)

Relying heavily on its decision in *People* v. *Speck*, 41 Ill. 2d 177, the court below makes the gossamer distinction that wholesale removal of prospective jurors for cause proscribed by *Witherspoon* becomes constitutionally permissible if done on a retail basis. (App. 8a-11a.) But, we say that the damge is precisely the same no matter how slowly or deliberately the *Witherspoon* doctrine is violated.

Clearly, emphatically, and categorically, your Honors said in *Witherspoon*:

> "Specifically, we hold that a death sentence cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon* v. *Illinois*, 391 U.S. 510, 522.)

That language was plain enough for the California Supreme Court to hold that reversal of a death sentence is automatically required if a single venireman was improperly excused for cause on the basis of his opposition to the death penalty. *In re Anderson*, 73 Cal. Rptr. 21 (11-18-68).

On April 2, 1969, this Court made it crystal clear that it meant just what it said in the *Witherspoon* case. *Boulden* v. *Holman*, ... U.S. ....., 5 CrL 3013. In a 7 to 1 decision, the case was remanded to the District Court for hearing, citing footnotes 9 and 21 of *Witherspoon*.

The court below also held that the State had sufficient peremptory challenges remaining to have eliminated those prospective jurors eligible to serve under *Witherspoon*. (App. 11a.)

The record refutes that holding.

Each side had 20 peremptory challenges under the statute. (Ill. Rev. Stat. 1963, chap. 38, par. 115-4 (e).) The prosecution had exercised 16 peremptory challenges. (Trial Record, pp. 146, 162, 242, 242, 242, 269, 277, 281, 303, 322, 322, 329, 329, 342, 346, 350.) There were 8 prospective jurors removed for cause clearly in violation of *Witherspoon* standards:

EXCERPTS FROM THE RECORD ON VOIR DIRE EXAMINATION.

Page of Record

118 ESTHER BYRNE, prospective juror:

122 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. Well, ordinarily enough, I take the same stand as Mr. Byrne. I don't believe in capital punishment.

Q. In other words, even if we have a law in this State to that effect, you wouldn't believe in it, anyway?

A. No, I don't, definitely not.

The Court: Very well. That's your prerogative. You're excused for cause.

LOUIS LORENS, prospective juror:

151 Q. Do you know of any reason why you cannot
152 be a fair and impartial juror in this case?

A. I do not believe in capital punishment.

The Court: Well, step down.

(Prospective juror excused.)

210 KATHERINE KRISTOCK, prospective juror:

212 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. I'm afraid I do. I don't believe in capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

MARIAN PETERSON, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I have very strong convictions against capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

NEBRASKA PETTY, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of a death penalty in a proper case?

A. I do.

The Court: Step down.

(Prospective juror excused.)

JACQUELINE B. THREATT, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. You do? What do you mean?

A. I don't believe in capital punishment.

Q. Say that again.

A. I feel very strongly aginst capital punishment.

The Court: Step down, please. Call another juror.

350 MARY GORSKI, prospective juror:

352 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do, your Honor.

The Court: All right, step down.

365 ANNA L. HOHNWALD, prospective juror:

366 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. Step down, please.

Since there were 8 veniremen removed for cause in violation of *Witherspoon* standards, and the State had only 4 peremptory challenges remaining, there were at least 4 prospective jurors that the State could not have removed peremptorily.

The holding of the court below is not only factually unsound but legally unsound. Error under *Witherspoon* is not excused simply because the prosecution has sufficient peremptory challenges to remove all such jurors. *In re Anderson*, 73 Cal. Rptr. 21.

The death penalty at bar should be summarily vacated.

CONCLUSION.

This case is unique.

Seldom if ever is a death penalty case affirmed with a dissenting opinion. Even rarer is a dissenting opinion in a death case that the defendant was not proven guilty beyond a reasonable doubt. (App. 13a-14a.)

The concealment of exonerating evidence from an accused whose ignorance of its existence precludes a request cannot be constitutionally tolerated, nor can threshold foreclosure of cross examination.

Victory at any price cannot be allowed to supplant the command of Canon 5 to "see that justice is done."

Moreover, we know of no case in which a weapon totally unconnected with the accused, admittedly unconnected with the death charged in the indictment, was used to obtain a death penalty in a trial in which the accused literally proved his innocence.

Petitioner prays that your Honors will consider his complaints to be of sufficient constitutional magnitude to warrant this Court's review.

Respectfully submitted,

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June 19, 1969

APPENDIX

Opinion of the Supreme Court of Illinois

Mr. Chief Justice Solfisburg delivered the opinion of the court:

In May, 1964, the defendant, Lyman Moore, was tried for the crime of murder. Following a jury trial in the circuit court of Cook County he was found guilty and sentenced to death. He appeals his conviction directly to this court contending that he was denied a fair trial and that he was not proved guilty beyond a reasonable doubt, and also appeals the denial of his petition for post-conviction relief.

On April 25, 1962, at approximately 10 P.M. two men were drinking in a tavern owned by Bernie Zitek in the village of Lansing, Illinois. One of these men began using profane language and, as a consequence, was forcibly removed from the premises by the owner. Present at this time was Patricia Hill, a waitress, and approximately seven other customers. One hour later a man rushed into the tavern, approached the bar, and shot Bernie Zitek in the chest with a shotgun, causing his death. The assailant immediately fled from the premises. Present at the time of the shooting were Patricia Hill and four customers who were playing cards at a table in the corner.

On October 31, 1962, a Chicago police officer was on patrol when the occupants of a 1957 Ford automobile shot at him and then fled from the car. The car was staked out by the police and the defendant and another man were arrested some time later as they were attempting to enter the car. The defendant and his companion were then taken to the Burnside Police Station. Later that night the de-

fendant was placed in a line-up at the station at which time he was observed by Patricia Hill, the waitress at Zitek's tavern. It is not clear from the record whether an identification was made at this time or on the following day, November 1, 1962, when a second line-up was held at which time Mrs. Hill identified the defendant as the slayer of Zitek. Although several other persons viewed the line-up with Mrs. Hill, including at least two of the men who had been playing cards at the time of the shooting, only Mrs. Hill was able to identify the defendant as the assailant at this time. At the time of his trial, however, one of the customers who had been present at the shooting identified the defendant as the assailant.

The defense at the time of the trial was mistaken identity and alibi and defendant adheres to this defense in this appeal, and contends he was not proved guilty beyond a reasonable doubt.

In support of this contention defendant insists that the witness, Patricia Hill, was honestly mistaken. However, Miss Hill positively identified defendant, both in a police line-up and at the trial, as the man ejected from Zitek's tavern who returned to kill him. The lighting was good and she was only six feet from the defendant, and had ample opportunity to observe him earlier in the evening.

Henley Powell also testified at the trial positively identifying defendant as the man who shot Zitek. One Virgle Sanders testified that two days after the shooting he had a conversation in the Ponderosa Tavern with the defendant who told him that it was open season on bartenders, and that he had just shot one in Lansing. Two other witnesses identified defendant as the man with Sanders in the Ponderosa Tavern.

(Supreme Court Opinion)

It is well settled that the positive identification of one witness, if credible, is sufficient to convict. (*People* v. *Brinkley,* 33 Ill. 2d 403; *People* v. *Donald,* 29 Ill. 2d 283.) The mere fact that others were present at a line-up and failed to identify the accused does not require reversal. *People* v. *Macias,* 39 Ill. 2d 208.

We have carefully examined the evidence and considered the opportunity of the witness to observe and the discrepancies in the testimony and find that the identification of the accused was sufficient to justify a conviction. Defendant's eloquent argument concerning the inherent problems of human identification would be more appropriate if addressed to the trier of fact.

Upon all the evidence the jury was justified in finding defendant guilty beyond a reasonable doubt.

We next turn to alleged error which defendant claims occurred at the trial. As previously stated, defendant was arrested on October 31, 1962, six months after the crime, when police were shot at and later saw two subjects running from a car. The car was staked out for five or six hours and the defendant and another man were arrested when they again approached the automobile. The police arrested the defendant and found a .38 caliber revolver at defendant's feet, a shoulder holster on his person, and a .16 gauge shotgun in the back seat of the car. The .38 caliber revolver and the shoulder holster were marked as exhibits and the State sought to introduce them. The evidence was ruled inadmissible and the jury instructed to disregard it. The .16 gauge shotgun was admitted into evidence although it was not positively identified as the death weapon.

(Supreme Court Opinion)

Defendant claimed that he was prejudiced by the evidence of the circumstances of his arrest, the display of the revolver and shoulder holster, and the admission of the shotgun into evidence. We do not agree. We think that despite the length of time between the crime and the arrest, testimony regarding the circumstances of the arrest was admissible, including testimony relating to the weapons found in defendant's possession or control at the time of the arrest. (*People* v. *Wright*, 30 Ill. 2d 519; *People* v. *Anderson*, 17 Ill. 2d 422; *People* v. *Davis*, 14 Ill. 2d 196; *People* v. *Jackson*, 9 Ill. 2d 484, 492; *People* v. *Smith*, 413 Ill. 218; *People* v. *Durkin*, 330 Ill. 394.) Since possession of the revolver and shoulder hoster were proper areas of testimony, and the items were not admitted into evidence and the jury was instructed to disregard them, we find no reversible error. (*People* v. *Holt*, 28 Ill. 2d 30; *People* v. *Carvin*, 20 Ill. 2d 32; *People* v. *Prohaska*, 8 Ill. 2d 579.) There is no clear evidence of the weapon actually used in this homicide, although it is clear that it was a shotgun. We have consistently held that a weapon found upon a defendant suitable for the commission of the crime charged is proper evidence even though there is no showing that it was the actual weapon used. *People* v. *Magby*, 37 Ill. 2d 197; *People* v. *Ostrand*, 35 Ill. 2d 520; *People* v. *McCasle*, 35 Ill. 2d 552; *People* v. *Lenhardt*, 340 Ill. 538.

The defendant further contends that the cross examination of the two identifying witnesses, Patricia Hill and Henley Powell, was unduly restricted. We have carefully examined the testimony of both Hill and Powell and their cross examinations, and the rulings on objections to the cross examinations, and we find no evidence that the trial judge abused his discretion in restricting it to matters

which explained, modified or discredited earlier testimony. *People* v. *Welch*, 22 Ill. 2d 558, 560; *People* v. *Moretti*, 6 Ill. 2d 494.

It is also argued that the prosecutor's closing argument was prejudicial in that he accused defense counsel of making a statement that was not true and stated that one of the witnesses was "scared to death" of the defendant. The latter remark was promptly stricken and the jury instructed to disregard it. We have examined the prosecutor's remarks regarding the misstatements of defense counsel and, while we consider them inappropriate, they were in response to equally inappropriate remarks of the defense. In examining the arguments as a whole we find no reversible error.

The last contention of the defendant concerning trial error regards an alleged oral instruction to the jury. The jury was given complete written instructions as requested and tendered by both the prosecution and the defendant fully covering the case, and the trial court further stated to the jury orally: "Now, in a murder case, the jury has the duty to determine first whether the defendant is guilty or not guilty. If you decide he is not guilty that ends the case. If you decide he is guilty of murder then you must next determine whether or not you wish to return a verdict of death. If you decide on a verdict of death you will so indicate in your verdict. If you have determined the guilt of the defendant and decide against a verdict of death you will return a verdict of guilty and the Court will fix the term of punishment."

While it is true that we have earlier held that instructions to a jury in a criminal case must be written, (*Ellis* v.

People, 159 Ill. 337,) this does not prevent a trial judge from making a brief explanatory statement of the forms of verdict that in no way contradicts the written instructions. We do not believe that this brief statement given here amounted to an oral instruction by the court and it clearly could not have prejudiced the defendant. *People* v. *Lamphear,* 6 Ill. 2d 346; *People* v. *Bydalek,* 381 Ill. 330.

Having examined the complete record in this case it is our conclusion that the defendant received a fair trial and that the evidence adduced justified the jury verdict finding him guilty beyond a reasonable doubt.

We next consider defendant's contention relating to his post-conviction petition. The gist of the allegations in the petition are that there was an unconstitutional concealment of evidence by the State and there was knowing use of perjured testimony by the prosecution. The alleged concealment involves police efforts to locate a man named "Slick". Virgle Sanders identified the man at the bar in the Ponderosa Tavern as a man he knew only as "Slick". It appears from the post-conviction hearing that in the course of the lengthy police investigation the police questioned a certain William Thompson who knew a "Slick," but he failed to identify Moore as the man he knew as "Slick". There was also a raid by the Lansing police on Wanda and Dell's Tavern in an attempt to find "Slick". Delbert Jones, the owner of the tavern, said he knew a "Slick" and could identify him but he was not there. After Moore was arrested the police did not contact Delbert Jones for identification and defense counsel were not informed about the raid on Wanda and Dell's Tavern at the time of trial. It also appears that the Lansing police had

the name of a James E. Watts in their files who was known as "Slick". There is no evidence however, that James E. Watts was the man who talked to Virgle Sanders or was in the Ponderosa Tavern.

None of the items allegedly concealed by the prosecution were requested by the defendant during the trial. It is clear that in a post-conviction hearing the burden is upon the defendant to show a denial of a constitutional right by a preponderance of the evidence (*People* v. *Evans,* 37 Ill. 2d 27), and the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material. (*Brady* v. *Maryland,* 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194.) We have examined the record on the post-conviction hearing and we do not believe that the defendant has shown by a preponderance of the evidence that the prosecution suppressed material evidence favorable to the accused which had been requested by the accused. The record discloses that the assistant State's Attorney at the trial showed his entire file to the defense attorney and no further request for disclosure was made. To sustain defendant's contention would be to require the prosecution to fully report every detail of lengthy police investigation including the following up of useless leads and discussions with immaterial witnesses. We conclude that defendant was deprived of no constitutional right because of any suppression of evidence by the prosecution.

Defendant next contends that the testimony of Virgle Sanders and Henley Powell was perjured and knowingly used by the prosecution. We find nothing in the record to clearly indicate that the testimony of either Sanders or

Powell was perjured and certainly it does not appear that any error in the testimony was known to the prosecution. Sanders testified that the defendant was the man he knew as "Slick". Even though it appears that he said he had met Slick at a time that Moore was in fact in prison, and that other people did not know Moore as "Slick", and the fact that Sanders had first stated that the man he knew as "Slick" was about 30 or 40 pounds heavier than Moore does not indicate perjury, but mere testimonial inconsistency. The only argument as to Powell's testimony was that it is contradicted by one of the defense witnesses, Donald O'Brien, and there was evidence that Powell was mistaken as to which direction he was facing at the card table when he viewed the defendant. Such contradictions in testimony go to the weight of the evidence and do not in any way indicate perjury. We therefore conclude that there was no such use of perjured testimony at the trial as to deny the defendant his constitutional rights, and the post-conviction petition was properly denied.

After the oral argument of this case the United States Supreme Court in *Witherspoon* v. *Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, held exclusion of jurors simply on the ground that they had scruples on capital punishment, without further inquiry to determine whether the juror could vote to inflict a death sentence, deprives a defendant of his right to a trial by a fair and impartial jury.

On *voir dire* in this case each juror was asked in substance: Do you have any religious or conscientious scrupsle against the infliction of the death penalty in the proper case? Twelve jurors positively asserted that they had

such scruples and were excused for cause without motion by the State or objection by the defendant.

The tenor of the entire examination, however, was unlike *Witherspoon* where the trial court promptly removed all who expressed the slightest qualms about capital punishment. The effort of the court to select a fair and impartial jury is indicated by the examination of prospective juror Conner:

"The Court: Q. Did you say Mr. Conner, that if you determine first, that the defendant is guilty and then you are to determine whether you should render a verdict of death that you couldn't consider that?

A. I said that I was one hundred percent for punishment, but if a man has to take another life to punish him, then I don't feel that I could be justified in taking it.

Q. In other words, you don't believe in capital punishment?

A. If that's what it amounts to.

Q. No, no. I'm asking you. I asked you, did you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. In a proper case, no, I don't have any objections and I could sign a death penalty in a proper case.

The Court: Well, I'm not going to remove him."

The court also conducted the following examination of prospective juror Nakata:

"Q. Likewise, you can't be a juror unless you, when you're sworn, and you are sworn to respect and observe the law.

A. That's the reason why I would like to give my reasoning right now, before I perjury myself about

that personally, because I can't go all the way on capital punishment.

Q. You can't go all the way?

A. No.

Q. Where do you stop?

A. It depends on the kind of crime it is and the evidence presented for it.

Q. Oh, that's all we are asking you to do.

A. Well, it seems to me, from the statements made by the prosecutng attorney, that he is going to ask for the death penalty, so, in view of that fact, I think I should disqualify myself.

Q. If he asks for it, it doesn't mean that you have to give it to him.

A. Of course, that's true, too. But, at the same time, though, I mean, I wouldn't be applying the law, as he stated it, you see, upon his presentation of the evidence, and all that, so I don't think I would be fair to the court or to the rest of the jurors by my being on the jury.

The Court: Step down, then, if you don't think you can be fair. I'm not going to ask you to try any further. The only question is, we want you to be fair and impartial."

In *People* v. *Speck*, 41 Ill. 2d 177, we held that the exclusion of jurors with scruples against the death penalty did not necessarily void the infliction of the death penalty. We there said: "The circumstances under which the *voir dire* examination here was conducted were quite different from those in *Witherspoon*. In that case the court noted that the tone was set when the trial judge said early in the *voir dire*, 'Let's get these conscientious objectors out of

the way without wasting any time on them.' In this case there was no hint of a desire for haste or for a perfunctory examination to see how many jurors could be disqualified on the statutory basis alone. On the contrary, the tone of the proceedings here indicated a sincere desire on the part of the prosecutor and the court (although perhaps not shared by the defense) to determine the jurors' qualifications according to the standard later held acceptable in *Witherspoon*."

It is also clear that in this case the State had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon*. We conclude that, because of the tenor of the examination and the availability of peremptory challenges, *Witherspoon* does not apply. See *People* v. *Mallett*, No. 39071.

We stated in *Speck*: "Whether one accused of crime has been afforded due process is not to be determined by inquiring as to whether certain formal language has been used; rather, the inquiry is whether the defendant has received a fair trial. We are satisfied that the court exerted every effort to insure the defendant's right to a trial by a fair jury, and we hold that the exclusion of certain jurors who stated that they had conscientious scruples against capital punishment did not deny the defendant a fair trial. See *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20, 27."

We have fully considered the numerous contentions advanced by the defendant and are of the opinion that his guilt was established beyond a reasonable doubt and that he received a fair trial. The judgments of the circuit court of Cook County are affirmed. The clerk of this court is di-

rected to enter an order fixing Friday, March 28, 1969, as the date on which the original sentence of death entered in this circuit court shall be executed. A certified copy of this order shall be furnished by the clerk of this court to the Sheriff of Cook County.

Judgment affirmed.

MR. JUSTICE WARD took no part in the consideration or decision of this case.

MR. JUSTICE SCHAEFER, dissenting:

The case against the defendant consisted of the following: (1) The identification of the defendant by the waitress, Patricia Hill, as the ejected customer who returned to the tavern and shot Bernie Zitek. (2) The identification of the defendant, by Henley Powell, as the man who came into the tavern and shot Bernie Zitek. Powell had not been in the tavern when the customer was ejected. (3) The identification of the defendant by Virgle Sanders as the man, nicknamed "Slick", who bragged of having shot a bartender in Lansing. Two other witnesses testified that the defendant was present in the Ponderosa Tavern at the time of the alleged bragging to Sanders, although they did not hear it.

The trial judge sustained prosecution objections to questions put to Patricia Hill as to when she had next seen the defendant after the date of the murder. The questions were clearly designed to elicit the circumstances under which she had identified the defendant. The objections were sustained on the ground that the questions went "beyond the examination in chief." Similarly, objections to the efforts of the defense to ascertain the circumstances of the initial identification of the defendant by Henley

Powell were sustained. These rulings were erroneous, for the circumstances of an identification clearly relate to its weight. With regard to Patricia Hill, the prosecution attempted to cure the error by eliciting from her on rebuttal the fact that she had viewed lineups on October 31, 1962, and on November 1, 1962. So far as Henley Powell was concerned, the prosecution made no attempt to correct the error.

Donald O'Brien testified that the defendant was not the man ejected from Zitek's tavern. O'Brien was playing cards with Henley Powell and others when the shot was fired. His back was to the bar and the door and he did not see the killer, although he ran out the door after him. O'Brien also testified that Patricia Hill was the only one of 7 persons who had been in Zitek's tavern ~~that night~~ who identified the defendant in the November 1, 1962, line-up. None of those other persons, including the other participants in the card game, was called as a witness.

The defense presented the uncontroverted and unimpeached alibi testimony, unmentioned in the majority opinion, of the head bartender and the general manager of the Westmoreland Country Club in Wilmette. Both testified, and the employment records of the Club showed, that the defendant was employed as a cocktail waiter until after midnight on the night of April 25, 1962, the date of Zitek's murder. He was paid overtime for that work.

On this record, in view of the strong alibi evidence, the testimony of O'Brien, the successful effort of the prosecution to conceal the circumstances under which its witnesses first identified the defendant and the failure of the prosecu-

tion to account for those who did not identify the defendant, I am unable to conclude that the defendant's guilt was established beyond a reasonable doubt.

I am also unable, for several reasons, to agree with the majority that the 16-gauge shotgun seized at the time of the defendant's arrest was properly admitted into evidence. In the cases cited by the majority no ballistic evidence was available, and therefore the suitability of the weapon for the commission of the crime charged could be established only by a physical description. In this case, however, the prosecution had ballistic test results in its possession throughout the trial which showed that Zitek was shot with a 12-gauge shotgun. The shotgun received in evidence was thus as unsuitable for the commission of this murder as was the excluded .38 caliber revolver. Furthermore, the ballistic evidence was admitted by stipulation only at the close of the defendant's case, after the prosecution had persistently resisted defense attempts to bring it out and after the shotgun had been received in evidence. Finally, there was no proof that the shotgun was in the possession or control of the defendant. It was discovered 6 months after the commission of this crime in a car that belonged to someone other than the defendant. No use of, or access to, that car by the defendant was shown. Under identical circumstances this court reversed another death sentence, saying, "We have found no case upholding the admission into evidence of weapons not proved to be in the possession or under the control of the defendant." (*People* v. *Smith,* 413 Ill. 218, 221.) That ruling should be applied in this case.

At the post-conviction hearing the defendant introduced a statement that Virgle Sanders had given to the Lansing

police on April 30, 1962, in which Sanders stated that he had met "Slick" "about six months ago." The defense did not learn of that statement until after the trial. When confronted at the post-conviction hearing with the fact that the defendant had been incarcerated in a Federal penitentiary until March 4, 1962, Sanders admitted that it was impossible that the defendant was the man who had bragged that he had shot the bartender. The F.B.I. report which showed the date of the defendant's release from Leavenworth was received by the Lansing police officers shortly after the defendant's arrest and was in their possession throughout the trial. Sanders' identification was further impugned by the fact that he did not see the defendant again after his alleged encounter with "Slick" until the day of the trial some 25 months later. At that time, when he first saw the defendant, he stated that "the guy that I knew as Slick looked to me to be about thirty or forty pounds heavier . . . and he didn't wear glasses." He testified that one of the officers replied, "Well, you know how jailhouse beans are."

Sanders testified at the post-conviction hearing that he remembered "Slick" as the man he knew from Wanda & Dell's Tavern who nearly became involved in a fight with a Willie Thompson. William Thompson also testified at the post-conviction hearing. He was acquainted with a "Slick" from Wanda & Dell's Tavern and was involved in the altercation mentioned by Sanders. In early November of 1962 the Lansing police showed him a number of photographs, including one of the defendant, but he was unable to identify any of them as the "Slick" that he knew. He was never called to view a line-up or to testify at the defendant's trial. Subsequent to the trial, Thompson was shown a series of photographs of James

E. ("Slick") Watts which he identified as photographs of the "Slick" he knew.

At the post-conviction hearing it was also brought out that on April 30 or May 1, 1962, the Lansing police had staged a raid of Wanda & Dell's Tavern in search of "Slick." Delbert Jones, the owner, testified that he then told the police that he could identify the "Slick" who frequented his tavern, but he was never contacted for that purpose. Jones testified that he had been shown a picture of the defendant and that the defendant was not "Slick". At the post-conviction hearing he identified a photograph of "Slick" Watts as the "Slick" who had frequented his tavern.

During the entire investigation of the Zitek murder the Lansing police suspected "Slick" Watts as the assailant and assigned a lieutenant to search for him. Thus there is convincing evidence that the defendant is not the man who had bragged to Sanders, and despite the majority's assertion to the contrary, there is substantial evidence that "Slick" Watts, and not the defendant, was that man. None of this exculpatory evidence was disclosed to defense counsel.

The defendant's conviction rests entirely upon identification testimony. The facts developed at the post-conviction hearing seriously impeached, if indeed they did not destroy, Sanders's trial testimony. Had those facts, and the identifications of "Slick" Watts by Thompson and Jones, been available at the trial, the jury may well have been unwilling to act upon the identifications of Patricia Hill and Henley Powell. Far more is involved in this case, in my opinion, than "the following up of

useless leads and discussions with immaterial witnesses." Certainly if Sanders's identification was material, the F.B.I. report and the testimony of the other witnesses which destroyed that identification were also material. Consequently, I believe that the State's nondisclosure denied the defendant the fundamental fairness guaranteed by the constitution. *Brady* v. *Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194; see *United States* v. *Wilkins* (2d Cir. 1964), 326 F. 2d 135.

The majority, however, disposes of this issue upon the ground that the defendant failed to request the evidence which was suppressed. This ground is neither factually nor legally sound. Prior to the trial the defendant had demanded copies of the grand jury minutes and of all statements made to the Lansing police. The motion was allowed only to the extent of providing the defendant with the statement of each witness who testified at the close of his direct examination. No statement of Virgle Sanders was supplied. Although, as the majority points out, the prosecuting attorney offered his file to the defense at the trial, that attorney was unable to recall whether the items here involved were in that file. The defendant's attorney testified that none of these items was disclosed to him.

Moreover, despite the language in *Brady* v. *Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, I do not believe that the Supreme Court intended to establish a request as an indispensable prerequisite to disclosure by the prosecution. Prior to *Brady* many courts had recognized the duty of the prosecution to disclose favorable, material evidence to the defense. And in many of those cases the defense did not know of the evidence and so

had failed to request it. (*Mooney* v. *Holohan*, 294 U.S. 103, 79 L. Ed. 791, 55 S. Ct. 340; *Pyle* v. *Kansas*, 317 U.S. 213, 87 L. Ed. 214, 63 S. Ct. 177; *United States* v. *Dye* (3d Cir. 1955), 221 F. 2d 763; *United States* v. *Baldi* (3d Cir. 1952), 195 F. 2d 815.) In *Brady* the Supreme Court acknowledged the long-standing duty that rested upon the prosecution. In doing so, it used language appropriate to the decision of the case before it. Without an explicit holding to the contrary, I cannot believe that the Supreme Court intended to narrow the duty of the prosecution as it had existed prior to *Brady* by making that duty contingent upon a request when the defense is ignorant of the existence of the suppressed information. Essential fairness, rather than the ability of counsel to ferret out concealed information, underlies the duty to disclose. *Brady* v. *Maryland*, 373 U.S. 83, 10 L. Ed. 215, 83 S. Ct. 1194; *Barbee* v. *Warden, Maryland Penitentiary* (4th Cir. 1964), 331 F. 2d 842; *United States* v. *Wilkins* (2d Cir. 1964), 326 F. 2d 135.

Whether or not the prosecuting attorneys were aware of the existence of the withheld evidence in the files of the Lansing police department is immaterial, for the prejudice to the defendant is identical whether the evidence is withheld by the prosecutor or by the police. What was said by the United States Court of Appeals for the Fourth Circuit in *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842, is applicable here: "Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information

is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. 'The cruelest lies are often told in silence.' If the police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging. The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused. We cannot condone the attempt to connect the defendant with the crime by questionable inferences which might be refuted by undisclosed and unproduced documents then in the hands of the police."

EP 26 1969

FILE COPY

No. 69-5001

No. 499-Misc.

In the

Supreme Court of the United States

OCTOBER TERM, 1969

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

MOTION OF AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AND ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT FOR LEAVE TO FILE BRIEF AMICI CURIAE, AND BRIEF AMICI CURIAE.

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The Scheffer Press, Inc.—ANdover 3-6850

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American Civil Liberties Union, Illinois Division, and Illinois Committee for Abolition of Capital Punishment move the Court for leave to appear as *Amici Curiae* in this case and to file a brief in support of the petitioner. Petitioner has consented to the filing of this brief.

American Civil Liberties Union, an organization devoted to the preservation of a free and open society, principally through the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States, has taken the position that capital punishment is inherently and increasingly a civil liberties issue. The Illinois Division has been especially active in the judicial struggle against the death penalty.

Illinois Committee to Abolish Capital Punishment joins with the American Civil Liberties Union, Illinois Divi-

sion, in this application. This Committee numbers in its membership leading citizens of the State of Illinois, of all religious faiths and professional, social and economic levels. It has been active in its field for several years and is familiar with the problems involved herein. Counsel for the movants are members of the Committee.

As we have heretofore said, capital punishment must be examined, not as if it were one among many punishments society chooses to impose upon its offenders, but one awful in contemplation and irrevocable in result. The issues must be considered in light of the fact that the death penalty is withering away everywhere. The dramatic decline is shown by the fact that in 1968 and thus far in 1969 there was not one execution in the entire country; in 1967, there were two executions, and in 1966 one. A substantial and growing segment of all Americans, probably a majority, is opposed to the death penalty. Yet, about 500 persons are now under sentence of death. Recently, this Court, in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), held that prospective jurors could not be disqualified from the jury simply because they have scruples against the death penalty. The court below, and courts throughout the country, have evaded the holding of this Court. These facts create a moral and constitutional dilemma that must be confronted and resolved by this Court. Hence the importance of granting certiorari herein and allowing the filing of *amici's* brief.

Respectfully submitted,

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BRIEF OF AMICI CURIAE IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Amici curiae, Illinois Division, American Civil Liberties Union, and Illinois Committee for the Abolition of Capital Punishment, file this brief in support of the petition for a writ of certiorari.

There are two compelling reasons for the grant of review in this case. One ground (see Part I below) is that it has become painfully apparent that the Illinois courts, as well as other courts throughout the nation, are attempting to nullify the holding of this Court in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), ruling that jurors may not be challenged for cause simply because they have scruples against the death penalty.

The other ground (see Part II below) is that the Illinois courts still do not understand that the prosecution may not withhold evidence favorable to the accused. In the case at bar such evidence was withheld, the defendant convicted and sentenced to death. There is substantial doubt as to the guilt of the accused.

I.

Certiorari Should Be Granted to Halt Wholesale Evasions of the Constitutional Protections Established by Witherspoon.

1. Witherspoon evasions by the Supreme Court of Illinois.

In our amicus brief in this case we consider together the holdings of the Supreme Court of Illinois in *Moore*, (the case at bar) *Speck* (now pending here on certiorari,

Misc. No. .....) and *People* v. *Mallette*.[1] In *Moore*, the Court below attempted to distinguish *Witherspoon* on the ground that in *Witherspoon* the trial court had simply acted hastily, whereas no such haste was displayed in *Moore*. *Witherspoon*, however, stands for a much broader principle—for the principle that a prospective juror cannot be disqualified simply because of scruples against the death penalty. Yet that is exactly what has occurred here.

In *Moore* eight veniremen out of 48 were excluded simply because of scruples. (For the Court's convenience we reproduce here the chart from our *amicus* brief in *Speck*, see pp. 5-6)

[1] For the cases below, see *People* v. *Speck*, 41 Ill. 2d 177, 242 NE 2d 208 (1968); *People* v. *Mallette*, ... Ill. 2d ....., 244 NE 2d 129 (1969); and *People* v. *Moore*, 42 Ill. 2d 173, 246 NE 2d 299 (1969).

Veniremen Excused	SPECK VOIR DIRE		MOORE VOIR DIRE		MALLETT VOIR DIRE	
	No.	Pct.	No.	Pct.	No.	Pct.
Hardship or by Agreement	32	5	1	2	2	2
Peremptory Challenges						
State	81	14	17	35	12	14
Defense	81	14	5	11	20	24
	162	28	22	46	32	38
"Scruples" without more expressed by venireman	57	10	8	17	22	25
"Scrupled" but would not inflict death	4	0	4	8	1	1
Not "scrupled" but would not inflict death	20	3	0	0	15	17
"Couldn't be fair"	320	53	1	2	3	3
Total Excused	595	99	36	75	75	86

	SPICE VOIR DIRE		MOORE VOIR DIRE		MALLETT VOIR DIRE	
	No.	Pct.	No.	Pct.	No.	Pct.
Veniremen Excused (total brought forward)	595	99	36	75	75	86
Veniremen Accepted			12	25	12	14
Jurors	12	1				
Alternate Jurors	2	0*				
Total Venire	609	100%	48	100%	87	100%

* Less than .5%

A few examples:

Mary Gorski, prospective juror:

"Q. Do you know of any reason why you cannot be a fair and impartial juror in this case? (R 350)

"A. No, sir.

"Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

"A. Yes, I do, your Honor.

"The Court: All right, step down."

Anna L. Hohnwald, prospective juror:

"Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

"A. No, sir.

"Q. Do you have any religious or conscientious scruples against the infliction of a death penalty in a proper case?

"A. Yes, I do.

"The Court: Step down, please."

The court below advanced also the contention that the prosecution could have removed *Witherspoon* qualified jurors by using peremptory challenges. This is simply not true. The State used 17 of 20 peremptory challenges. It could not have removed more than three of the eight scrupled veniremen.

In our *Speck* amicus brief, we discuss at greater length our contentions on this point. Since we have considered the *Moore, Speck* and *Mallette* cases in that brief we ask the Court to refer to it.

2. Wholesale Witherspoon evasion by other state courts

Were it only the Supreme Court of Illinois which has sought to evade the ruling of this Court in *Witherspoon, amici* would conclude that it is simply a case of a single

Court reluctant to accept this Court's rulings, understandable since it is their ruling in that case which had been overridden. A study of the cases across the country since *Witherspoon* indicates, however, broad refusal to give effect to that decision.

In at least twenty cases in fifteen different states, the clear mandate of this Court in *Witherspoon* has been either ignored or evaded. The cases are collected in petitioner's supplemental brief in *Maxwell* v. *Bishop*, October Term 1969, No. 13 at pp. 8a-18a. It is quite clear that only California and Georgia are complying generally with *Witherspoon*. Almost all other courts which have passed on *Witherspoon* issues have found reasons for declining to set aside death sentences. Only by granting *certiorari* in this and similar cases will this deplorable situation be remedied.

Let us mention a few typical patterns of avoidance:

In one case (*Davis* v. *State*, 440 S.W. 2d 244 (Ark. 1969)), the court flatly refused to follow *Witherspoon*, stating that the jury box is not the proper place for considering attitudes on capital punishment.

Perhaps the most common single excuse given for not applying *Witherspoon* "strictly" was that the trial court, while violating the letter of that ruling, had complied with its spirit. In *Bell* v. *Patterson*, 402 F.2d 394 (10th Cir. 1968) the Court held that excluding two jurors improperly was not sufficient reason to reverse, since the state had not "crossed the line of neutrality." A similar holding is *State ex rel. Brent* v. *White* (No. 47,265, Crim. Div., 19th Judicial District Court, East Baton Rouge Parish, La., July 31, 1969) that since the prosecution had also excused jurors with scruples against life imprison-

ment, the jury was neutral and *Witherspoon* does not apply.

In *State* v. *Mathis*, 52 N.J. 238, 245 A.2d 20 (1968) the Court held that it is not the number of scrupled jurors who are excused, but "whether the totality of the trial court's treatment of the subject operated to deprive the defendant of an opportunity for a jury of a representative quality." And in both *Commonwealth* v. *Rightnour*, 253 A. 2d 644 (Pa. 1969) and *State* v. *Aiken & Wheat*, 452 P.2d 232 (Wash. 1969) it was held that the trial court has a broad discretion and since he has seen and heard the jurors the reviewing court will not reverse in the absence of a clear abuse of discretion.

In *Jaggers* v. *Commonwealth*, 439 SW 2d 580 (Ky. 1968) the court cited *People* v. *Speck*, 41 Ill. 2d 177 (1969) for the proposition that it is the "atmosphere of the proceeding" that counts.

It is next to impossible for an appellate court to reconstruct the "atmosphere" of a courtroom where a defendant is on trial for his life from a cold written record. From afar it is impossible to tell whether the "atmosphere" was fair or unfair. To state that the defendant has had an opportunity to obtain a constitutionally required jury from a remote reconstruction of the atmosphere surrounding the selection of those jurors is to evade the duty to uphold our constitution. The rule laid down by this Court in *Witherspoon* is clear. No juror may be excused by the State on the ground that he has some scruples against the death penalty. *No* juror. There is absolutely no reason to allow this mandate to be avoided. There is no rule of *de minimus* where constitutional rights are at stake. Only by granting certiorari in cases such as this will this Court make that principle clear.

Another ground often cited is failure of defense counsel to make proper objection below. In this category fall the cases of *State* v. *Peele*, 274 N.C. 106, 161 SE 2d 568 (1968); *State* v. *Wigglesworth*, 18 Ohio St. 2d 171, 248 NE 2d 607 (1969); *Pittman* v. *State*, 434 SW 2d 352 (Tex. Crim. App. 1968); and *Scott* v. *State*, 434 SW 2d 678 (Tex. Crim. App. 1968).

In several other cases, the courts are vague and confusing in their reasoning. Indeed all that can be said about these opinions is that they all indicate a deliberate attempt to evade *Witherspoon*, but in none of these cases is there an adequate explanation of why the *Witherspoon* standards were not violated. In some of these cases it is difficult to tell whether *Witherspoon* was violated or not as the opinions do not contain enough information upon which to base a reliable opinion. Into this category fall the following cases: *Wilson* v. *State*, No. 36,677, (Fla., July 9, 1969); *State* v. *Crook*, 221 So. 2d 473 (La. 1969); *Curtis* v. *State*, 4 Md. App. 499, 243 A.2d 656 (1968); *Duisen* v. *State*, 441 SW 2d 688 (Mo. 1969); and *Koonce* v. *State*, No. A-14,826 (Okla. Crim. App. May 21, 1969).

In short, this Court's decision in *Witherspoon* is being followed sporadically at best. Of greatest importance is that every one of these cases involves the death penalty. Where a defendant is faced with the loss of his life, the prosecution and judiciary should lean over backward to make sure that he is assured all of the protections of the law. Instead, many courts are engaging in judicial nit-picking in a clear attempt to evade the law of the land as announced by this Court.

This Court should grant *certiorari* in this case to assure that *Witherspoon* will not be stillborn. There is no point in proclaiming a constitutional principle if it is to become

rhetoric rather than reality. We must make certain that there is no vitiation of a constitutional right where the penalty which faces the defendant is irrevocable.

II.

Certiorari Should Be Granted To Reaffirm the Principle That A Conviction May Not Stand Where it was Procured by Deliberate Suppression of Evidence By the Prosecution.

Subsequent to petitioner's conviction, his attorneys discovered that vital evidence known to the prosecution had been deliberately and knowingly suppressed in a brazen and deliberate plan to insure that petitioner would be convicted when there was very real and substantial evidence that he had not in fact committed the crime with which he was charged.

On April 25, 1962, an unruly customer was thrown out of a Lansing, Ill. bar by the bartender, Zitek. A short while later this customer returned and shot the bartender in the heart with a twelve-gauge shotgun. The prosecution's case against petitioner was based upon: 1) the testimony of a waitress, Patricia Hill, that petitioner was the customer who had killed the bartender; 2) the testimony of a patron, Henley Powell, that petitioner was the customer who had killed the bartender; and 3) the testimony of Virgle Sanders that petitioner was a man known as "Slick" who had bragged two days after the murder that he had shot a bartender in Lansing.

Subsequent to petitioner's conviction several facts were discovered which cast great doubt upon these identifications; these facts were known to the prosecution at the trial but not revealed to the defense.

1. Virgle Sanders had given a written statement to the Lansing police stating that he had met "Slick" in a

tavern *at a time when petitioner was incarcerated in a federal penitentiary.* When confronted with this information at the post-conviction hearing, Sanders admitted that it was impossible that petitioner was the person he knew as "Slick."

2. When Sanders first saw petitioner at the trial twenty-five months after "Slick" had bragged of killing the bartender, he told the Lansing Police, in the presence of the prosecutors that "Slick" was 30 or 40 pounds heavier than petitioner.

3. After obtaining Sanders' written statement, the Lansing police raided the tavern in which Sanders had met Slick, at which time the owner, Delbert Jones told them that he knew and could identify "Slick." When petitioner was arrested, the police did not contact Jones for the purpose of identifying petitioner.

4. One William Leon Thompson, who knew both Delbert Jones and Virgle Sanders, told police that he knew and could identify "Slick", but when shown a photograph of petitioner he told police that petitioner did not resemble "Slick."

5. The Lansing Police drew a diagram of the murder scene which showed that the prosecution witness Henley Powell was not telling the truth when he stated at the trial that he was facing the entrance of the tavern through which the killer entered.

Each and every one of these extremely crucial pieces of evidence were concealed from petitioner and his attorneys, either by the prosecution, the Lansing police or both. Six months prior to the trial petitioner, through his attorneys, filed a motion demanding a copy of the grand jury minutes and any and all written statements in the possession of

the Lansing Police taken from any witnesses. This request was denied on the ground that these statements would be given to petitioner's counsel at such time as these witnesses testified at the trial. The statement of Virgle Sanders was not shown to petitioner's counsel at this time.

There is no question that this vital information was deliberately suppressed by the prosecution. The prosecution had a suspect. It was determined to secure a conviction and any evidence which was inconsistent with petitioner's conviction was not only ignored but suppressed. This Court has gone on record time and time again condemning in the strongest possible terms such subterfuge and dishonesty on the part of the prosecution. Most recently in *Miller* v. *Pate*, 386 U.S. 1, 7 (1967) this Court said:

> "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. . . . There has been no deviation from that established principle. . . . There can be no retreat from that principle here."

This Court must stand ready to protect the rights of those, like petitioner here, who have been unfairly convicted based on evidence known by the prosecution to be false. The police and the prosecution have an investigative advantage which cannot be matched by any private individual. They have the authority to question, search and investigate. All law-abiding citizens will naturally cooperate with the police in an investigation into a crime such as a murder. It is the duty of the police, a duty they must perform with unswerving fairness, to search for the truth, not merely a conviction. From time to time the truth will not be discovered, due to the unavoidable frailty of human

beings. In such instances injustices will inadvertently occur.

But, such injustices must not be allowed to occur because the police and the prosecution are more interested in obtaining a conviction, any conviction, than in discovering the truth. Here the police soon became aware of one "Slick," who was known to several persons interviewed by the police. Being unable to find the real "Slick," the police and the prosecution set out falsely to identify petitioner as "Slick." Not only did they falsely so identify petitioner, they concealed from petitioner and his attorneys evidence which they had in their possession and control which would have shown that petitioner was not in fact that person.

The Court below based its conclusion that this suppression of evidence did not violate due process because petitioner has not requested them prior to or during the trial! Aside from the fact that this is at least partially false, the argument itself is indeed specious. How could petitioner request evidence of which he was not aware? A criminal trial, particularly one involving a possible death penalty, is not a sporting event, to be determined by the side which is best able to ferret out evidence most favorable to it and conceal that which is unfavorable. If this is in fact the manner in which a criminal trial is to be conducted, the defendant is bound to lose. The police and prosecution, clothed with the power and majesty of the law, are able to assign as many men and other resources as are necessary to investigate the crime. The defendant, especially in a case such as this where he is almost certainly innocent, is unable to do so both before and after his arrest. Before, because he is not even aware that there is an investigation in process or that he need obtain any information and

evidence. And after, because he is almost certainly incarcerated without the opportunity to make bond.

The police and a prosecutor are sworn to uphold the law and enforce justice. Every time they conceal evidence and suggest, however subtly, to a witness that something is a fact which is not a fact, they undermine the very foundation upon which our society is based. The duty of a prosecutor is to seek justice, not merely to secure convictions. He must have an absolute duty to disclose to the defense any and all evidence in his possession which is or may be favorable to the accused.

This Court should take this case to make clear, once again that such deviousness as shown by the prosecution in this case will not be tolerated. This cannot be emphasized too often.

CONCLUSION

We join in petitioner's request for certiorari. Only by such a grant will the integrity of our system of criminal justice be upheld. We ask that at least certiorari be granted on the penalty issue. The Court below has so far departed from *Witherspoon* that we ask for summary reversal as to penalty.

Respectfully submitted,

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Office-Supreme Court
FILED
OCT 21 196
JOHN F. DAVIS, CL

No. 69-5001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

MISC. [redacted]

LYMAN A. MOORE,

Petitioner

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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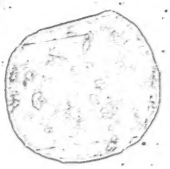

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OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 42 Ill. 2d 73, 246 N.E. 2d 299.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether there was an unconstitutional concealment of evidence by the State.

Whether the cross examination of identifying witnesses was unduly restricted where the attempted cross examination went beyond the examination in chief and where defense counsel failed to call the witnesses as his own.

Whether the defendant was denied due process of law by the admission into evidence of a sawed-off sixteen gauge shot gun when introduced to show the circumstances of the arrest, the existence of a gun suitable for the commission of the crime, and the defendant's modus operandi.

Whether the defendant was denied his right to a trial by a fair and impartial jury where the court and the prosecutor showed a sincere desire to determine the jurors' qualifications according to *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968) and where the State had sufficient peremptory challenges to have eliminated those prosepective jurors eligible to serve under *Witherspoon.*

Whether the execution of the death sentence constitutes cruel and unusual punishment.

STATEMENT OF FACTS

On April 25, 1962, at approximately 10:00 p.m., Lyman Moore and a companion were drinking in a tavern owned by Bernie Zitek in the village of Lansing, Illinois. Moore began using profane language and, as a consequence, Zitek forcibly removed him from the premises. Present at this time were Patricia Hill, a waitress, and approximately

seven other customers. The defendant was positively identified by Mrs. Hill as the ejected patron (Abst. 25; R. 475). One hour later the defendant returned to the tavern with a shotgun. He approached the bar, aimed the gun at Zitek and fired. The blast struck Zitek in the chest, killing him. As Moore fired the shot he was again observed by Patricia Hill who later positively identified him as the murderer (Abst. 26; R. 484). He was also identified by another eyewitness, Henley Powell (Abst. 32; R. 525-526). The lighting conditions of the bar were good, and Mrs. Hill was only six feet from the defendant (Abst. 26; R. 48).

After firing the fatal shot, Moore fled the premises, pursued by Henley Powell. Powell's pursuit ended when he was warned by Moore not to come any further or he too would be shot (R. 529).

Two days later, at a different tavern known as the Ponderosa Tap, a man known as "Slick" bragged to one Virgle Sanders that he had shot a bartender in Lansing (Abst. 351). Sanders identified that defendant as "Slick." Two other witnesses identified the defendant as the man with Sanders at the tavern.

On October 31, 1962, a Chicago police officer was on patrol when the occupants of a 1957 Ford automobile shot at him and then fled from the car (Abst. 57; R. 623-624). The defendant and another man were arrested some time later as they were attempting to enter the car (Abst. 78; R. 682). A sixteen gauge shotgun, which was introduced into evidence, was found in the back seat of the car (Abst. 60; R. 630). The defendant and his companion were taken to a police district station. Later, the defendant was placed in a lineup at which time he was observed by Patricia Hill, the waitress at Zitek's tavern. Mrs. Hill identified the defendant as Zitek's slayer.

Moore's defense was that he was not the man who did the killing and he produced several witnesses to that effect (Abst. 96; 106; R. 745, 765).

The jury found the defendant guilty, and fixed the penalty at death (Abst. 218; R. 1003). In a hearing on aggravation and mitigation the defendant's efforts to reduce his penalty failed because of, inter alia, his five prior felony convictions (R. 1010-1012):

(1) 1946, larceny, one to five years;

(2) 1949, larceny, one to ten years;

(3) 1957, bank robbery, seven years;

(4) 1957, Dyer Act, two years;

(5) 1962, armed robbery, twenty to forty years.

The sentence of the court was death (Abst. 220; R. 1017).

At the post conviction hearing it was discovered that Sanders had given a statement to the Lansing police in which he said that he had met the defendant six months prior to the conversation at the Ponderosa Tap. Sanders could not have met the defendant when he said he did because Moore was serving a federal prison term at the time (Abst. 354). Moreover, one William Thompson, who was acquainted with a local resident named "Slick," told the police that Lyman Moore did not resemble the man known to him as "Slick" (Abst. 255, 267, 273, 278). A bartender who also knew "Slick" told the police that he could identify "Slick" but was never called for that purpose (Abst. 254, 255). These facts were not known to the defense at the time of trial. There was no showing that the State's Attorney had these facts in his possession (Abst. 320; R.P.C. 204), and the defense never asked for these facts

(R.P.C. 347). The entire State's Attorney's file was shown to the defense at the trial (Abst. 318; R.P.C. 201).

Henley Powell testified at the trial that at the time of the crime he was sitting facing west (Abst. 32; R. 526). Officer Koppitz testified that a sketch he made showed Mr. Powell sitting in a northeast direction (Abst. 340; R.P.C. 269), but also stated that it didn't matter because all of the people sitting at the table had an excellent view of the entire crime (Abst. 340; R.P.C. 269). At the trial, the defense never requested any information from officer Koppitz when he testified.

The trial judge ruled that the defense had failed to meet its burden of proof and had not shown any suppression of evidence or any use of false testimony (R.P.C. 379-381).

On appeal the conviction and the denial of post-conviction relief were affirmed by the Illinois Supreme Court.

I.

THERE WAS NO UNCONSTITUTIONAL CONCEALMENT OF EVIDENCE BY THE STATE.

The defense here contends that there was an unconstitutional concealment of six items of exonerating evidence at trial. The facts allegedly concealed are as follows:

1. Virgle Sanders gave a written statement to the Lansing Police which stated that he first met the man known as "Slick" in Wanda and Del's tavern about six months prior to the murder, a time when the defendant was serving a federal prison sentence.

2. Delbert Jones, the owner of Wanda and Del's told the police that he could identify "Slick" but was never called for that purpose.

3. Soon after Virgle Sanders supplied the name "Slick" to the Lansing Police, a suspect named James E. "Slick" Watts was apprehended and photographed.

4. William Thompson, who was acquainted with a man named "Slick" failed to identify the defendant as that man.

5. After the passage of twenty-five months Virgle Sanders saw Lyman Moore at trial and observed that the man he knew as "Slick" was 30 or 40 pounds heavier than the defendant.

6. The Lansing Police file contained a diagram, drawn by a Lansing officer, that would have shown that Henley Powell was seated with his back to the entrance through which the defendant passed.

Undoubtedly, any individual circumstance or set of circumstances which exculpate or tend to diminish the quality and weight of the prosecution's case can be said

to be relevant and can not be knowingly withheld from the defense. However, broad generalizations on criminal discovery are of little aid in delineating the dimensions of due process in any particular case. It is imperative to keep in the mind this Court's mandate in this regard:

> "We now *hold* that the suppression by the *prosecution* of evidence favorable to the accused upon *request* violates due process where the evidence is *material* . . ." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). (Emphasis added.)

It is against the above standard that the prosecution's conduct in the instant case must be measured.

The record produced below indicates that the Assistant State's Attorney at trial displayed his entire file to the defense. (Abst. 318-319; R.P.C. 201). Thus any information which the petitioner now claims material was not in the direct possession of the prosecutor at trial. Since there is no claim of knowing suppression by the prosecutor of any evidence, the issue devolves to whether it is the obligation of a prosecuting attorney to ferret out every conceivable piece of potentially impeaching evidence that may be contained in police files. The promulgation of such a rule is neither realistic nor necessary for the fundamental fairness due every defendant. A major murder investigation may involve scores of fruitless leads. The search for the phantom "Slick" in the present case is but an example. It is singularly naive and unfair to impose upon prosecutors the responsibility to interrogate police officers in an effort to elicit facts which when viewed in hindsight might have a favorable bearing on the conduct of the defense.

Unquestionably no prosecutor may engage in knowing suppression of evidence. However, the Constitution and

the proper administration of criminal justice demand of the prosecution good faith and a quest for truth. They do not require an inquiry into all the areas of police investigation with an eye toward preventing possible inadvertant and immaterial omissions.

Admittedly police misconduct resulting in the suppression of material evidence even without the prosecutor's knowledge cannot be condoned. This, however, has not been shown to be the case here. Moreover, a state post-conviction proceeding, designed for just such a inquiry, produced no contrary conclusion.

It is submitted that there must be a showing of intent or knowledge before an unconstitutional suppression takes place. The underlying standard of conduct at trial must be fundamental fairness: Defendants cannot hope to obtain reversals upon subsequent findings of minutiae in police files. Virtually every investigatory file will contain some fragmentary evidence which may cast doubt on the perceptive abilities of witnesses. Very often such files will also reveal the existence of persons who may have been suspected of involvement at one time. But in the course of investigation facts are uncovered which absolve some parties and further implicate others. In the gradual shift from investigation to accusation the focus of guilt sharpens to include only the very few. In some cases the sifting process rejects all but one. Here, the overwhelming evidence established Lyman Moore as that person.

When the decision is made to prosecute, the State's Attorney must rely on the integrity of the police. He expects to receive all relevant evidence: both inculpatory and exculpatory. Occasionally it will happen that minor items of evidence will not be turned over simply beeause the police view them as immaterial. Neither common sense nor the Constitution require a complete and detailed ac-

counting of all police work on a case. The defense has no right to such information and has cited no case to substantiate such a claim.

Particular emphasis has been laid on the fact that Virgle Sanders, unknown to defense counsel, informed the Lansing Police that he had first met the defendant about six months prior to the murder. Sanders was, of course, demonstrably in error since Lyman Moore was serving a federal prison term at the time. Defense counsel claims that this is highly impeaching and exculpatory. The State cannot agree. At the worst, it simply shows that Virgle Sanders, like many people, is not adept at estimating time. The period of six months was only a guess. At the post conviction hearing defense counsel called Virgle Sanders' attention to the incident at the Ponderosa Tap two days after the murder. Sanders had testified at trial that Lyman Moore was present at the tavern and that they had a conversation (R. 578-579) in the course of which the defendant said that it was "open season on bartenders" (R. 583) and that he had shot one in Lansing (R. 587). In laying the foundation for Sanders' relationship with Moore, the prosecutor asked Sanders whether he had known the defendant before that day. Sanders replied that he had, but that he couldn't estimate how long he had known Moore (R. 580). At the post conviction hearing, defense counsel asked Virgle Sanders whether he had given the Lansing Police a signed statement that he had met Lyman Moore six months prior to the incident at the Ponderosa Tap. Sanders, who has a fourth grade education, said that he could not read the long hand statement (he can only read printed words) and that the six month period was only a "rough guess" (R.P.C. 124). In answer to further questioning, Sanders said, ". . . it could have been

from two, three months to nine months. I don't know" (R.P.C. 125).

A second source of contention springing from Sanders' comments to the Lansing Police entails a confusion of identities between the defendant and a man named "Slick." At the post conviction hearing, Sanders admitted that the person whom he knew as Slick, and that he had met several months earlier, wore his hair differently (R.P.C. 134), was heavier and did not wear glasses (R.P.C. 130). Sanders, in answer to a leading question, said that if Lyman Moore was in prison at the time he first met "Slick," it would have been impossible for Lyman Moore and Slick to have been the same person (R.P.C. 132-133).

Notwithstanding this confusion of identities, it is the State's view that Virgle Sanders' murky recollections of a man named Slick are irrelevant to his positive identification of Lyman Moore as the man he knew and spoke with at the Ponderosa Tap. Sanders' statements are buttressed by the testimony of two other men who saw him speak to Lyman Moore at the Ponderosa.* The first, William Joyce, was the bartender at the Ponderosa on that day (R. 552, 554-555). He testified that he served several drinks to Virgle Sanders and Lyman Moore, and observed them talking (R. 561-562, 564). Joyce also said that Moore asked him for a ride (R. 562). Joyce accomodated Moore by arranging for a ride with Robert Fair, the owner of the tavern and the second man to observe Lyman Moore speaking with Virgle Sanders (R. 562, 564, 600-602). Fair drove Lyman Moore and his companion to Harvey, Illinois (R. 602-604). In the course of the automobile trip to Harvey

*It is relevant to note that neither of these two men were called as witnesses by defense counsel at the post conviction hearing.

Fair heard Moore's companion say, "Well, if we hadn't had that trouble with the bartender in Lansing, we'd have been all right" (R. 606).

Thus, Virgle Sanders' confusion of identities between the defendant and the ubiquitous Slick and when he first met him, is scarcely material to the facts established. The proof that Lyman Moore and Virgle Sanders were previously acquainted when they met and spoke together at the Ponderosa is overwhelming.

The same could be said of all the State's evidence. In addition to the two eyewitnesses who saw the defendant kill the bartender, a third witness stated that he heard Moore brag about the murder. Any further question about Moore's identity is dispelled by two more witnesses who saw him speaking to Sanders at the time and place in question. The capstone is found in the off-hand admission of Moore's companion.

In affirming the defendant's conviction the Illinois Supreme Court was in total harmony with constitutional standards for criminal discovery. In order to constitute a violation of due process, favorable evidence must be suppressed by the prosecution after it has been requested by the defense. Moreover, the evidence must be *material* either to guilt or to punishment. *Brady* v. *Maryland*, 373 U.S. 83 (1963). Certainly any of the items complained of here would not have disturbed the finding of guilt or the setting of the death penalty. The fact that two eyewitnesses successfully identified Moore as the killer has not been overcome.

Nor does the failure to produce any of the above items come within the constitutional prohibition against the knowing use of false evidence. *Miller* v. *Pate*, 386 U.S. 1 (1966). No false evidence was used against the defendant.

Virgle Sanders' incorrect estimate of when he first met the defendant is not false evidence. He spoke the truth according to the best of his recollection. A mistaken belief is not perjury. Even if Sanders' miscalculation (or any of the other items complained of) could be characterized as "false evidence," they did not play a "vital part in the case for the prosecution" as required by *Miller* v. *Pate*.

The Second Circuit has explored the various standards for reversal in cases of suppression in *United States* v. *Keogh*, 391 F. 2d 138 (2nd Cir. 1968). The court isolated three categories:

> (1) deliberate suppression in which the court includes "not merely a considered decision to suppress, taken for the very purpose of obstructing, but also a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention" (pp. 146-147);
>
> (2) suppression by the prosecutor of evidence favorable to the accused upon request;
>
> (3) and "where hindsight discloses that the defense could have put the evidence to not insignificant use" (p. 147).

In the court's view the first two situations present no difficulty. The third presents a problem. The court concludes that while in some instances relief should be granted, the standard of materiality must be considerably higher than the usual level of probity required for admissibility. The State subscribes to this analysis and suggests that in this case the evidence does not reach this high level of materiality.

It has never been held that the prosecution's duty to disclose extends to all evidence possibly admissible and useful to the defense. Nor has it been established what specific degree of prejudice must be shown in order to warrant

a new trial. The cases, however, indicate that insignificant items of unproduced information will not overturn a conviction. De minimis cannot defeat due process. The evidence suppressed in *Giles* v. *Maryland*, 386 U.S. 66 (1967), is representative of the sort of withheld data which has produced reversals. In *Giles* the State suppressed evidence which would have severely discredited the prosecutrix in a rape case. The effect of the evidence would have been sufficient to show that the "victim" of the rape was blatantly promiscuous and had probably consented to relations with the defendants. Thus, the effect of the evidence in *Giles* and other cases along this line of decisions has been such as would have produced an acquittal or substantial reduction in sentence. Neither of these criteria have been met in the present case. To grant a reversal in the instant case would be an invitation to every defendant to search for inconsistencies in the investigator's files long after his conviction. The impact on our present system of criminal justice can only be imagined. The Eight Circuit has pondered the implications in *Johnson* v. *Bennett*, 386 F. 2d 677, 680 (8th Cir. 1968):

> "[A]ll the Supreme Court cases setting aside convictions for want of due process by reason of the reception of false testimony are based upon the knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed. Such would appear to be a proper limitation to the rule. If convictions could be set aside years after they become final merely upon proof that some testimony of a witness proved to be false, there would be no finality to convictions and the orderly administration of justice would be unduly hampered."

In addition to these policy considerations, there remains the simple fact that a fair trial was not denied the petitioner, and no knowing suppression of material evidence took place.

II.

THE CROSS EXAMINATION OF THE IDENTIFYING WITNESSES WAS NOT UNCONSTITUTIONALLY RESTRICTED.

The defense has contended that their cross examination of the two identifying witnesses was unduly limited by the trial judge. At the outset, it is important to note that cross examination of witnesses is a matter for the discretion of the trial court. There can be no reversal except where there has been an abuse of discretion. *People* v. *Andrews*, 327 Ill. 162, 158 N.E. 462 (1927); *Rea* v. *Missouri ex rel. Hayes*, 171 Wall. 532, 21 L. Ed. 707 (1873). In Illinois it has been frequently stated that cross examination must be strictly confined to matters touched upon during direct examination. *People* v. *Morris*, 30 Ill. 2d 406, 197 N.E. 2d 433 (1964). One of the first jurists to sponsor this rule in America was Mr. Justice Story in *Philadelphia & T. R. Co.* v. *Stimpson*, 14 Pet. 448, 461, 10 L. Ed. 535 (1840). The rule he enunciated was as follows:

> "[A] party has no right to cross examine any witness except as to facts and circumstances connected with the matters stated in his direct exxamination. If he wishes to examine him to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause."

The underlying reason for confining the scope of cross examination is to promote order and method in the presentation of a case. Each party must have an opportunity to present his side of the controversy without the introduction of matters unrelated to his case in chief and not touched upon in his evidence. This rule makes the issues as clear as possible to the jury by reducing to a minimum the possibility of the intermingling of matters purely de-

fensive in character with the facts of the state's case. 6 Wigmore, Evidence § 1887 (3d ed. 1940). The issues are clarified and confusion eliminated to the greatest possible extent by the separation of their respective contentions and the testimony produced in support thereof.

The law is also quite clear in Illinois that cross examination of identification witnesses is restricted to matters which explain, modify or discredit earlier testimony. *People* v. *Coli*, 2 Ill. 2d 186, 117 N.E. 2d 777 (1954).

In the instant case a waitress named Patricia Hill was called as a witness. She identified the petitioner Lyman Moore as the ejected customer who returned to Zitek's tavern to shoot the bartender (Abst. 25-26). During cross examination the defense asked Patricia Hill when the next time was that she saw the defendant after the shooting (Abst. 28; R. 492). An objection was sustained on the ground that the question went "beyond the examination in chief" (Abst. 28, 31). Defense counsel was, however, later permitted to ask this question and get an answer (Abst. 31; R. 515). Therefore, even if an error had been committed in sustaining the earlier objection it was subsequently cured. *People* v. *Morgan*, 28 Ill. 2d 55, 190 N.E. 2d 755 (1963). The defense next tried to question the witness concerning the details of two police lineups which she had attended. Objections to these questions were also sustained (Abst. 31; R. 516). On direct examination nothing had been brought out about seeing the defendant at any other time. The trial judge made his position clear when in a hearing out of the presence of the jury he said (R. 503):

> "THE COURT: You can go into identification and you can go into any statements she made to the police, with reference to her identification, but I'm not

> going to let you go into how many other times. That's what I'm telling you very frankly. You may go into any question of identification she gave to the police about this man, but I'm not going to let you ask her, how many other times has she seen the man since, when she hasn't gone into that on direct. That's what I meant. Because it isn't necessary to do that, in order for you to impeach her on identification. You don't need to impeach her by asking her how many other times she saw him. There are plenty of ways of impeaching her on identification."

Thus the position of the trial judge was clear. He was not restricting cross examination which would discredit the witness but merely foreclosing irrelevant cross examination which went beyond the scope of direct examination.

In rebuttal, Patricia Hill testified that she had gone to a lineup with one Donald O'Brien and that she had been to a lineup the night before (Abst. 144; R. 873). The defense failed to cross examine her on the point. Evidence brought out by defense questioning verified the fact that Patricia Hill had attended more than one lineup (Abst. 166; R. 790-791). Thus, the argument of the defense that they were unduly restricted is completely without merit. The defense was only prevented from bring out irrelevant matters.

The defense complains of a similar restriction on the cross examination of Henley Powell. Powell also identified the petitioner as the man who came into the tavern and shot the bartender. The defendant again claims that he was precluded from inquiring into what transpired at two Chicago police lineups; the first of which occurred on the

night of October 31, 1962, and the second on the next day, November 1, 1962 (Abst. 31, 145). The defendant ignores the fact that Henley Powell later testified that he did not attend police lineups in October or November, 1962. This fact was brought out on cross examination by the defense (Abst. 143). If the defendant was desirous of exploring any other collateral sources of identification, it behooved him to call Henley Powell as his own witness. He failed to do so.

The failure of the defendant to call Patricia Hill or Henley Powell as his own witness is made doubly damaging when one considers the witnesses that he did call. The only "witness" to the murder called by the defense was Donald O'Brien. He testified that at the time of the murder he was playing cards with his back to the door and the bar and did not see who fired the shot (Abst. 115). O'Brien also stated that Henley Powell was sitting to his right which would mean that Powell was facing northeast, i.e., toward the bar. Thus, the defense chose to bypass two witnesses who did see the fatal blast in deference to a single witness who did not.

It is clear that although a defendant has every right to cross examine the identifying witness, such right is by its very nature restricted to matters which explain, modify or discredit the earlier testimony. Since the attempted questions had no such effect, it was beyond the scope of the direct examination, immaterial, and therefore, improper.

This well known rule of procedure has not been changed by recent constitutional decisions involving the Sixth Amendment right of confrontation. See *Pointer* v. *Texas*, 380 U.S. 400 (1965) and *Douglas* v. *Alabama*, 380 U.S. 415 (1965). These cases guarantee an accused the right to confront the witnesses against him by preserving the right

to ask the witness such questions as will either discredit the witness or establish the defendant's innocence by revealing the truth. *Pointer* and *Douglas* do not say that the defense is absolved from following the rules of evidence nor immune from the more basic requirements of relevance and materiality.

The distinction between the rules of evidence on cross examination and the demands of the Sixth Amendment are apparent in *Smith* v. *Illinois*, 390 U.S. 129 (1968). There the defendant was on trial for the illegal sale of narcotics. The principal witness against him was a man who identified himself on direct examination as "James Jordan." The witness was a police informant whose name and address the prosecution wished to keep secret. The court sustained the state's objections to the disclosure of the witness's correct name and his address. The trial judge thereby precluded the defense from ever making such inquiries, either during cross examination or on direct examination as the defense's own witness. The information sought was relevant and the questions were asked at an appropriate time. Moreover, the defendant had a constitutional right to hear the answers.

In the instant case the defense most assuredly had a right to the answers they were seeking—but not on the prosecution's time and not when the questions were irrelevant to the matters touched upon during direct examination. When the opportune moment came for such questions the defense failed to ask them because they knew answers would not be helpful.

In *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), this Court held that because of the possibility of unfairness to the accused in the way a lineup is conducted, a lineup is a "critical stage" in the prosecution, at which the accused must be

given the opportunity to be represented by counsel. That holding does not, however, apply to the defendant's case, for the lineups in which he appeared occurred before June 12, 1967. *Stovall* v. *Denno,* 388 U.S. 293 (1968). But in declaring the rule of *Wade* and *Gilbert* to be applicable only to lineups conducted after those cases were decided, this Court recognized that, judged by the "totality of the circumstances," the conduct of identification procedures may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law. 388 U.S. 302. See *Simmons* v. *United States,* 390 U.S. 377, 383 (1968); *Foster* v. *California,* 394 U.S. 440 (1969).

The defendant seeks to place his case within the ambit of *Stovall* and the cases following. He uses the device of innuendo to suggest that the police lineups improperly induced his identification. The defendant again engages in the fiction that he was precluded from effective cross examination. It was entirely within his province to call any of the police officers or witnesses present at the lineups. Whether or not the persons in the lineups differed from him in appearance was peculiarly within his own knowledge. If any unfairness occurred at the pretrial confrontations it was easily discoverable. Instead, the defense was content not to question the regularity of the lineups until now. Again the State asserts that the defendant's claim of prejudice is erroneous. The defendant cannot obtain the benefit of his dark inferences of procedural unfairness when he failed to make use of the many opportunities afforded him and has not offered a single item of proof to substantiate his claim.

Each time that an opportunity presented itself to inquire further into the facts defendant now claims would be most favorable to his case, defense counsel turned away.

III.

THE DEFENDANT WAS NOT DENIED DUE PROCESS OF LAW BY THE ADMISSION INTO EVIDENCE OF A SAWED-OFF SIXTEEN GAUGE SHOTGUN.

The defense here claims that it was error to admit into evidence a sawed-off sixteen gauge shotgun on the premise that the deceased was killed with a twelve gauge shotgun.

It is a well established principle in Illinois and elsewhere that circumstances of the arrest may be brought before the jury. *People* v. *Wright*, 30 Ill. 2d 519, 198 N.E. 2d 316 (1964). Here the police were fired upon and saw a man fleeing from a car (Abst. 57; R. 623-624). The defendant was later arrested entering the very same car (Abst. 78; R. 682). In the back seat of the car was a loaded sixteen gauge shotgun (Abst. 61, 66; R. 630-641).

The Illinois rule is stated in *People* v. *Smith*, 413 Ill. 218, 221, 108 N.E. 2d 596 (1952), where it is said:

> "[W]eapons found in a defendant's possession or control at the time of his arrest on a murder charge may be the subject of testimony pertaining to the details of the arrest."

Thus, the shotgun was admissible purely on the ground that it was clearly in the constructive possession of those arrested on a murder charge. It was also admissible on independent grounds of relevance. The only evidence in the record as to the weapon in the crime was medical testimony that a shotgun was used. The witness, however, stated that he did not know what size shotgun was involved (Abst. 40; R. 573). The only other evidence was a stipulation that if a certain police officer were called he would

testify that in his opinion a twelve gauge shotgun was used (Abst. 139; R. 553). Hence, no conclusive proof was ever adduced to show what gauge shotgun was used to fire the fatal blast.

Illinois courts have always held that it is proper to admit into evidence any weapon found within the defendant's control suitable for the commission of the crime charged, even though there is no showing that it is the actual weapon used. Thus, in the case of *People* v. *Lenhardt*, 340 Ill. 538, 549, 173 N.E. 155 (1930), the Illinois Supreme Court said:

> "It is competent to prove that an accused person, when arrested, possessed a weapon suitable for the commission of the crime charged against him, even though no claim is made that he actually used it in committing the particular crime."

The foundation for this rule of evidence is easily understandable. Most cases ultimately turn on the conclusions reached by the finder of fact. In many cases physical evidence is adduced which is related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Such evidence does not usurp the province of the jury, since the jury does not have to accept the witness's opinion. *Miller* v. *Pillsbury*, 33 Ill. 2d 514, 516, 211 N.E. 2d 733 (1967). Illinois courts have not abandoned the principle that such opinion evidence should be received with caution. *Thomas* v. *Cagwin*, 43 Ill. App. 2d 336, 193 N.E. 2d 233 (1963). There is always the possibility that a given expert in the field of weaponry is simply wrong in his deductions. And in this case the witness' expertise was not established in the record. It is, therefore, quite understandable why Illinois courts will permit the introduction of a weap-

on found within a suspect's control at the time of his arrest which is suitable for the commission of the crime charged, even though no claim is made that he actually used it on the occasion in question. Accordingly, in the case of *People* v. *Ostrand*, 35 Ill. 2d 520, 221 N.E. 2d 499 (1966), a "snub-nose" revolver was used in a robbery. A larger revolver was found on the defendant at the time of his arrest and admitted into evidence. It was held that such a discrepancy goes only to the weight of the evidence and not the admissibility. In the instant case there is a diminutive amount of evidence in the record to establish the size of the shotgun used in the murder. It is entirely possible that the weapon found in the defendant's possession could have been the murder weapon. There can be no doubt that the shotgun found at the time of the defendant's arrest was similar to the murder weapon and was, therefore, properly admitted into evidence.

For these reasons it is apparent that the weapon was not used against the petitioner to denounce him as a "bad man" without regard to his guilt or innocence. It is a well established rule that evidence of prior crimes cannot be introduced when it has no purpose other than to show criminal disposition. *Spencer* v. *Texas*, 385 U.S. 554 (1961). There are, however, numerous instances where evidence of prior crimes is admissible. In such cases the probative value of the evidence outweighs the possible prejudicial effect on the jury. Here, there was a distinct possibility that the shotgun in evidence was the very same gun that killed the bartender. Moreover, ready access to a loaded shotgun could be considered a part of the defendant's modus operandi.

It is clear that the "other crime," when it is found to be independently relevant and admissible, need not be estab-

lished beyond a reasonable doubt, either as to its commission or as to the defendant's connection therewith. 1 Wharton, Criminal Evidence, § 366 (11th ed. 1935). The decision as to whether the logical relevance of the gun conterbalanced any improperly damaging effect on the defendant was with the trial court. Here, the possibility that the shotgun could have been the murder weapon, plus its distinctive character tending to show a modus operandi, combine to establish a high degree of relevancy. In the instant case the trial judge clearly acted within his permissible discretion in affirmatively weighing the actual need for the admission of the shotgun in light of the issues and the evidence.

IV.

THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY UNDER THE WITHERSPOON DOCTRINE.

The defendant asks that his death sentence be vacated upon the authority of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). In that case it was held that the exclusion of jurors simply on the ground that they had scruples against capital punishment, without further inquiry to determine whether the juror could vote to inflict a death sentence, deprives a defendant of his right to a trial by a fair and impartial jury.

During the *voir dire* in the present case each venireman was asked in substance whether he had any religious or conscientious scruples against the infliction of the death penalty in the proper case. In the context of the entire *voir dire*, including the trial court's efforts to determine whether the jurors would consider all possible verdicts, it cannot be said that there had been removed from the jury

"for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty." *Bumper v. North Carolina*, 391 U.S. 543, 545 (1968). Twelve jurors positively asserted that they had such scruples and were excused for cause without motion by the State or objection by the defendant.

The general course of the examination, however, was unlike *Witherspoon* where the trial judge promptly removed all who voiced the slightest disdain for the death penalty. The effort of the trial court to select a fair and impartial jury is reflected in the examination of prospective juror Conner:

> "The Court: Q. Did you say Mr. Conner, that if you determine first, that the defendant is guilty and then you are to determine whether you should render a verdict of death that you couldn't consider that?
>
> A. I said that I was one hundred percent for punishment, but if a man has to take another life to punish him, then I don't feel that I could be justified in taking it.
>
> Q. In other words, you don't believe in capital punishment?
>
> A. If that's what it amounts to.
>
> Q. No, no. I'm asking you. I asked you, did you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?
>
> A. In a proper case, no, I don't have any objections and I could sign a death penalty in a proper case.
>
> The Court: Well, I'm not going to remove him." (R. 145).

Another example is the following examination of prospective juror Nakata:

"Q. Likewise, you can't be a juror unless you, when you're sworn, and you are sworn to respect and observe the law.

A. That's the reason why I would like to give my reasoning right now, before I perjure my self about that personally, because I can't go all the way on capital punishment.

Q. You can't go all the way?

A. No.

Q. Where do you stop?

A. It depends on the kind of crime it is and the evidence presented for it.

Q. Oh, that's all we are asking you to do.

A. Well, it seems to me, from the statements made by the prosecuting attorney, that he is going to ask for the death penalty, so in view of that fact, I think I should disqualify myself.

Q. If he asks for it, it doesn't mean that you have to give it to him.

A. Of course, that's true, too. But, at the same time, though, I mean, I wouldn't be applying the law as he stated it, you see, upon his presentation of the evidence, and all that, so I don't think I would be fair to the court or to the rest of the jurors by my being on the jury.

The Court: Step down, then, if you don't think you can be fair. I'm not going to ask you to try any further. The only question is, we want you to be fair and impartial." (R. 227-229)

It is the State's understanding of the *Witherspoon* doctrine that the exclusion of jurors with scruples against capital punishment does not necessarily void the infliction of the death penalty. The tenor of the *voir dire* examination here was quite different from that of the *Witherspoon* court. In that case the tone was set early in the *voir dire*

when the trial judge said, "Let's get these conscientious objectors out of the way without wasting any time on them." In this case, there was no hint of a desire to be unduly rash in selecting the jury. To the contrary, the mood of the proceedings here indicated a sincere desire to determine the jurors' qualifications. The fact that the questioning became more abbreviated as the examination progressed indicates merely an increase in efficiency, not a sellout to haste.

It is also clear that in this case the State had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon*. Since this was a capital case each side had 20 peremptory challenges under the applicable Illinois statute. Ill. Rev. Stat. 1963, Chap. 38, par. 115-4(e). None of the State's peremptory challenges was exercised against veniremen who were totally opposed to capital punishment. Nothwithstanding this fact the State still failed to exhaust all of its peremptory challenges at the close of the examination. If defense counsel had elected to question further and had been able to elicit from a few challenged veniremen the response that despite their religious or philosophical principles they might be able to sign a death verdict, the composition of the jury would have been no different in respect to its propensity to invoke the death penalty. The State would have used the necessary number of its peremptory challenges to excuse these vacillating veniremen lest they prevent any verdict from being reached by creating a dispute in the jury room over whether the death penalty is ever proper. It is apparent, therefore, that the *voir dire* examination in the present case conformed to *Witherspoon* standards.

V.

EXECUTION OF THE DEATH SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Amici curiae, the American Civil Liberties Union and the Illinois Committee for the Abolition of Capital Punishment, have petitioned this Court to declare that the penalty of death is cruel and unusual punishment. They announce two bases for their contention:

> (1) That the Illinois courts do not understand the *Witherspoon* doctrine, and
>
> (2) That the Illinois courts sponsor unethical prosecutions and favor the unconstitutional suppression of evidence. (A. C. Br. 3)

Following this outrageous, gratuitous, and false insult to the courts and prosecutors of Illinois, amici curiae conclude with an extraordinary exercise in anti-logic by concluding that capital punishment should be abolished.

Historically the Eighth Amendment has been used to prohibit punishment which is inherently cruel or cruelly excessive. See, for example *Rosenberg* v. *Carral*, 99 F. Supp. 630 (S.D. N.Y. 1951) and *State* v. *Evans*, 73 Idaho 50, 245 P. 2d 788 (1952). But punishment by death (at least where it does not add unnecessary suffering) has consistently been held to be outside of the Eighth Amendment prohibition. Courts have also rejected the contention that capital punishment is *per se* a denial of due process. For example, the Washington Supreme Court recently held that:

> "The Fifth Amendment refers specifically to "capital cases," and also states . . . that a person may not be deprived of his life without due process. The Fifth Amendment also provides that a person may not be twice put in jeopardy of his life. Implicit in these are their corollaries—that the State may deprive an individual of his life if the proceedings are in accord with the requirements of due process and may place him in jeopardy once for a given offense. Certainly, if the state can call upon the most responsible and law abiding of its young men to sacrifice their lives in battle, it has the power, under the constitution, to execute one who, in a proceeding in which the requirements of due process have been strictly observed, has been found by a jury of his peers to have committed a crime so heinous that, in its opinion, his life should be exacted as a penalty. *State* v. *Smith*, 446 P. 2d 571, 589 (Wash. 1968).

It is unnecessary to further explore the numerous lower court cases across the country which have held squarely against the views expressed by the petitioners. Their arguments were disposed of in *Trop* v. *Dulles*, 356 U.S. 86, 99 (1958) when this Court held that "the death penalty has been employed throughout our history, and in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." Mr. Justice Brennan, in a concurring opinion, observed that among the several purposes of the criminal law is the deterrence of a wrongful act "by the threat of punishment and isolation of society from dangerous individuals by imprisonment or execution." 356 U.S. 86, Ill. Moreover, *Witherspoon* v. *Illinois*, *supra*, unmistakably assumes that a sentence of death is a constitutionably permissible punishment for the crime of murder.

Although deterrence is a questionable by-product of capital punishment in most homicides, it certainly must have

some impact on those who would contemplate a murder as ruthless as that committed by Lyman Moore. A shotgun execution after an hour's deliberation is hardly the sort of hot blooded crime that is arguably undeterable. Even if it were, it is not the province of the courts to eradicate the form of punishment chosen by the populace and reserved for the most reprehensible to walk among us. The defendant must surely be counted in this number.

CONCLUSION

For the foregoing reasons the Respondent requests that the Petition for Writ of Certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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No. 69-5001

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E. ROBERT SEAVER,

In The

Supreme Court of the United States

October Term, 1969

No. 420-Misc. 5001

LYMAN A. MOORE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For A Writ Of Certiorari To
The Supreme Court Of Illinois

SUPPLEMENTAL BRIEF UNDER RULE 24 (5)

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SUPPLEMENTAL BRIEF UNDER RULE 24 (5)

May It Please Your Honors:

This brief is filed pursuant to the provisions of Rule 24 (5) of this Court to call attention to a new case decided by this Court since the time of petitioner's last filing on June 19, 1969.

On March 31, 1970, in the case of *In re Winship*, ... U.S. ....., 25 L. Ed. 2d 368, 375, this Court held:

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

We were sorely tempted to raise the reasonable-doubt issue in our petition for writ of certiorari. It was our central theme in the court below. But this Court had not clearly spoken on the subject. Now, after the explicit holding in *In re Winship*, it becomes a moral imperative.

PETITIONER WAS NOT PROVEN GUILTY BEYOND A REASONABLE DOUBT.

Mr. Justice Schaefer, dissenting, sums up this voluminous record on the reasonable doubt issue as follows:

> MR. JUSTICE SCHAEFER, dissenting:
>
> The case against the defendant consisted of the following: (1) The identification of the defendant by the waitress, Patricia Hill, as the ejected customer who returned to the tavern and shot Bernie Zitek. (2) The identification of the defendant, by Henley Powell, as the man who came into the tavern and shot Bernie Zitek. Powell had not been in the tavern when the customer was ejected. (3) The identification of the defendant by Virgle Sanders as the man, nicknamed "Slick", who bragged of having shot a bartender in Lansing. Two other witnesses testified that the defendant was present in the Ponderosa Tavern at the time of the alleged bragging to Sanders, although they did not hear it.
>
> The trial judge sustained prosecution objections to questions put to Patricia Hill as to when she had

next seen the defendant after the date of the murder. The questions were clearly designed to elicit the circumstances under which she had identified the defendant. The objections were sustained on the ground that the questions went "beyond the examination in chief." Similarly, objections to the efforts of the defense to ascertain the circumstances of the initial identification of the defendant by Henley Powell were sustained. These rulings were erroneous, for the circumstances of an identification clearly relate to its weight. With regard to Patricia Hill, the prosecution attempted to cure the error by eliciting from her on rebuttal the fact that she had viewed lineups on October 31, 1962, and on November 1, 1962. So far as Henley Powell was concerned, the prosecution made no attempt to correct the error.

Donald O'Brien testified that the defendant was not the man ejected from Zitek's tavern. O'Brien was playing cards with Henley Powell and others when the shot was fired. His back was to the bar and the door and he did not see the killer, although he ran out the door after him. O'Brien also testified that Patricia Hill was the only one of 7 persons who had been in Zitek's tavern that night who identified the defendant in the November 1, 1962, line-up. None of those other persons, including the other participants in the card game, was called as a witness.

The defense presented the uncontroverted and unimpeached alibi testimony, unmentioned in the majority opinion, of the head bartender and the general manager of the Westmoreland Country Club in Wilmette. Both testified, and the employment records of the Club showed, that the defendant was employed as a cocktail waiter until after midnight on the night of April 25, 1962, the date of Zitek's murder. He was paid overtime for that work.

On this record, in view of the strong alibi evidence, the testimony of O'Brien, the successful effort of the

prosecution to conceal the circumstances under which its witnesses first identified the defendant and the failure of the prosecution to account for those who did not identify the defendant, I am unable to conclude that the defendant's guilt was established beyond a reasonable doubt. (App. 12a-14a)

THE STRONG ALIBI EVIDENCE UNMENTIONED IN THE MAJORITY OPINION.

As pointed out by Mr. Justice Schaefer in his dissenting opinion, uncontroverted and unimpeached alibi testimony in the case at bar is unmentioned in the majority opinion. (App. 13a)

Where was petitioner Moore on the evening of the murder at 10:55 P.M.? Working as a cocktail waiter in a country club over 50 miles from the scene of the crime. (A. 109)

The head bartender of the Club testified that he kept employment records upon which the cocktail waiters were paid (A. 96); that petitioner Moore served from 5:00 P.M. until 1:30 or 2:00 A.M. (A. 97) and was paid overtime for working that evening. (A. 99) He saw him personally because he and the petitioner had the same room. (A. 100)

The general manager of the Club testified that his records indicate that petitioner Moore was paid overtime for April 25th, 1962. (A. 106)

He testified that each department head has a responsibility of maintaining his time book; that at the end of each pay period they are sent up to the auditor's office where they are transferred to the official payrolls; that his duties included checking the book and also checking the employees as against the book. (A. 107)

He checked to see whether petitioner Moore was working between 8:00 P.M. and midnight. He testified that he defi-

nitely would know if petitioner Moore was not there for an hour or more. (A. 108)

How many cases that involve undisputed work-record alibi evidence ever reach review? We found only one. *Regina* v. *Boyd,* (1953) Ont. 215.

The majority could not get around the fact that petitioner Moore could not be in two places at the same time. So, they simply ignored it.

VIRGLE SANDERS' TRIAL TESTIMONY THAT PETITIONER MOORE WAS THE MAN WHO BRAGGED THAT HE HAD SHOT A BARTENDER IN LANSING WAS IMPEACHED BY FACTS DEVELOPED AT THE POST CONVICTION HEARING.

Mr. Justice Schaefer points out in his dissenting opinion that prosecution witness Sanders' trial testimony was seriously impeached if not destroyed by facts developed at the post conviction hearing. (App. 16a)

Virgle Sanders testified at the trial that he knew the petitioner Moore; that he had seen him before a number of times; that he knew him only by the nickname "Slick"; that he saw him in the Ponderosa tavern two days after the murder (A. 41-42); that "Slick" knew that Sanders tended bar part time and that he said, "Virgle, it's open season on bartenders. I shot one in Lansing, Wednesday night." (A. 44, 47, 351)

Facts developed at the post conviction hearing reveal that when Virgle Sanders first laid eyes on petitioner Moore at the trial, he said to Lt. Turbin and other Lansing police officers, in the presence of the prosecutors, "The guy that I knew as 'Slick' looked to be about 30 or 40 pounds heavier than this guy." (A. 294) The Lansing police officers

said, "Well, you know how those jailhouse beans are." (A. 295)

Virgle Sanders also testified on post conviction that he saw the man that he knew as "Slick" in Wanda and Del's tavern *before Christmas of 1961.* (A. 295) When confronted with the fact that petitioner Moore had been incarcerated in a federal penitentiary until March 4, 1962, he admitted that it was *impossible* for petitioner Moore to be the man that he knew as "Slick" who two days after the murder bragged that he had shot a bartender in Lansing. (A. 296)

PETITIONER MOORE IS NOT THE MAN WHO BRAGGED TO SANDERS THAT HE SHOT THE BARTENDER IN LANSING.

Mr. Justice Schaefer points out in his dissenting opinion that there is convincing evidence that petitioner is not the man who bragged to Sanders that he shot a bartender in Lansing. (App. 16a)

Facts developed at the post conviction hearing revealed that the Lansing police knew that Delbert Jones was the proprietor of Wanda and Del's tavern and that Virgle Sanders, William Leon Thompson, and the man known only as "Slick" were patrons of Wanda and Del's tavern. They all knew each other. (A. 254, 271, 283, 291, 293, 298, 336)

1. The Lansing police had spoken to Thompson in the Ponderosa tavern three days after the homicide, at which time Thompson told them that he had heard about the bragging incident by "Slick" on the previous afternoon. (A. 265, 281-284)

2. On Monday, April 30, 1962, at 8:50 P.M. Sanders gave a written statement to the Lansing police in which he related the statements made by "Slick" on Friday afternoon in the Ponderosa, and stated, ' 'I have bumped into this guy in and around Dolton, and at Wanda and Del's in Roseland, 119 Union. The first time I met him was about six months ago . . ." (A. 351)

3. That same night the Lansing police raided Wanda and Del's tavern, looking for "Slick". The owner-bartender Delbert Jones told them that he knew and could identify the man known as "Slick" (A. 254).

WHEN PETITIONER MOORE WAS ARRESTED THE LANSING POLICE CONTACTED ONLY ONE OF THE THREE PEOPLE WHO COULD IDENTIFY "SLICK". WHEN THAT PERSON TOLD THEM THAT PETITIONER MOORE WAS NOT "SLICK", THE LANSING POLICE AVOIDED THE OTHER TWO.

Petitioner Moore was arrested on October 31, 1962. (A. 58)

The Lansing police took a photograph of petitioner Moore to the home of William Leon Thompson (A. 251, 272, 361) and he told them that it did not resemble the man called "Slick". (A. 255, 267, 273, 278) The Lansing police told Thompson that they were going to take him to view petitioner Moore in person but they never did. (A. 278)

The Lansing police did not contact Delbert Jones to have him view and identify petitioner Moore as the man known as "Slick" (A. 255, 336-337), nor was he shown the photograph of petitioner Moore that was shown to Thompson (A. 336-337, 347).

Virgle Sanders was not permitted to look at petitioner Moore until May 13, 1964, over two years later, when he was brought to court to testify at the trial (A. 294).

At the post conviction hearing Delbert Jones testified that he had seen a photograph of petitioner Moore and said that he was not the man called "Slick". (A. 333) Jones saw petitioner Moore in person in the Cook County Jail on December 23, 1964, and said that he was not the man known as "Slick". (A. 337)

William Leon Thompson testified that petitioner Moore was not "Slick"; did not resemble "Slick". (A. 272-273)

And Virgle Sanders testified on post conviction that it would have been impossible for petitioner Moore to have been the man called "Slick". (A. 296)

JAMES E. "SLICK" WATTS VOLUNTARILY CONFESSED TO VIRGLE SANDERS THAT HE MURDERED BERNIE ZITEK .

Mr. Justice Schaefer in his dissenting opinion points out: "despite the majority's assertion to the contrary, there is substantial evidence that "Slick" Watts, and not the defendant, was that man." (App. 16a)

The Lansing police had a suspect by the name of James E. "Slick" Watts, and a photograph of him in their file. (A. 275) Chief Braschler assigned Lt. Turbin to "look for" "Slick" Watts. (A. 346)

Thompson testified on post conviction that he knew the man called "Slick" (A. 271) who frequented Wanda and Del's tavern in the fall of 1961 (A. 273).

Thompson was shown photographs of James E. Watts, and he testified that they were photographs of "Slick" (A. 274, 275, 276, 277, 278, 362).

At the post conviction hearing, Delbert Jones identified a photograph of James E. Watts (A. 274, 362) as the man known as "Slick" that used to come into his tavern in the fall of 1961. (A. 332, 334-335)

Mr. Justice Schaefer says that if the jury had known the facts developed on post conviction they may have been unwilling to act upon the identifications of Patricia Hill and Henley Powell. (App. 16a)

THE IDENTIFICATION TESTIMONY IS NOT CLEAR AND CONVINCING.

The killing occurred in a matter of seconds. (A. 32) The assailant was a stranger to all concerned. (A. 29)

Patricia Hill

Over six months elapsed between the crime and the "identification" of petitioner Moore by Patricia Hill on November 1, 1962. (A. 144) She was the only one of 7 persons who had been summoned by the Lansing police to view that lineup that identified petitioner Moore. (A. 116) Patricia Hill had viewed a lineup on the night before in which petitioner Moore was present. She did not identify him at that time. (A. 31, 116, 145)

Henley Powell

Henley Powell "identified" petitioner Moore for the first time two years and one month after the shooting (A. 143). Powell testified that he saw the shooting (A. 32) but there is a diagram that was uncovered in the post conviction proceeding that contradicts him and shows him to be facing away from the shooting. (A. 358, 360) He was never invited to view petitioner Moore until the day he testified against him in court (A. 143). Also there is a statement in the State's Attorney's file that he gave to Detective Mori-

arty on January 10, 1967, in which he said that when he saw petitioner Moore in court "he was thinner, his cheek bones were protruding more than when he shot Bernie". (page 3)

THE TESTIMONY OF DEFENSE WITNESS O'BRIEN IS CORROBORATED.

Donald O'Brien testified for the defense that he did not see who fired the shot, but that petitioner Moore was *not* the man that the deceased ejected at 10:00 PM (A. 114, 116, 117).

Patricia Hill testified that the man that was ejected at 10:00 PM is the man that returned at 10:55 PM and shot the deceased (A. 25-26).

O'Brien is corroborated by "the uncontroverted and unimpeached alibi testimony, unmentioned in the majority opinion" (App. 13a) which also shows Patricia Hill to be mistaken when she "identified" petitioner Moore.

CONCLUSION.

Under the provisions of Rule 24 (5) of this Court and the recent explicit holding in *In re Winship,* .... US ...., 25 L Ed. 2d 368, 375, that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necesssary to constitute the crime with which he is charged, petitioner prays that your Honors will consider the following additional question presented for revew:

Q. Whether the petitioner was proven guilty beyond a reasonable doubt?

Petitioner further prays that your Honors will grant certiorari, and after being fully advised in the premises answer that question in the negative and reverse the judgment of the court below.

Respectfully submitted,

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FILE COPY

Supreme Court, U.S.
FILED
AUG 14 1971
E. ROBERT SEAVER, CLERK

No. 69-5001

In the

Supreme Court of the United States

OCTOBER TERM, 1971

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AND ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT AMICI CURIAE

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BRIEF OF ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION, AND ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT, AMICI CURIAE

Amici curiae, Illinois Division, American Civil Liberties Union, and Illinois Committee for the Abolition of Capital Punishment, file this brief pursuant to leave heretofore granted by this Court. Amici believe it to be necessary and desirable to supplement what has heretofore been said by them in their motion and brief in support of the petition for a writ of certiorari, granted by this Court on specified grounds. They respectfully refer the Court to their motion and brief, filed in case No. 490 Misc. in the October Term, 1969. As there stated, it is essential that this Court make it abundantly clear that no accused person may be sent to his death or his conviction sustained when the prosecution has withheld substantial evidence favorable to the accused. Here there is sufficient evidence of such suppression to cast substantial doubt on the very guilt of the accused. In addition, the ruling of the Court in the *Witherspoon* case has been improperly thwarted by the Illinois courts. These and other points are fully considered hereinafter.

We would like to acknowledge the assistance of David Cook, a third year law student at the University of Chicago, in the preparation of this brief.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AND ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT AMICI CURIAE

Statement of Facts

In May, 1964, petitioner Lyman A. Moore was found guilty of the murder of bartender Bernie Zitek in Lansing, Illinois, on April 25, 1962. At the trial, the state presented two alleged eyewitnesses, waitress Patricia Hill and customer Henley Powell (whose physical position in the tavern was inconsistent with his being able to identify the killer) (Tr. 522, 530), who identified the defendant as the murderer. (TR. 485-486, 525-526.) A third witness, Virgle Sanders, testified that on April 27, 1962, Moore, known to him as "Slick," admitted having shot a bartender in Lansing, Illinois. (TR. 581, 583-584, 587.) In support

of this testimony, two other witnesses, Robert F. Fair and William Joyce, identified petitioner as present with Virgle Sanders at the time of the admission.[1] (TR. 555, 602.)

At the time of the trial, the State possessed evidence indicating that Virgle Sanders' identification of petitioner Moore as "Slick" was incorrect. This evidence consisted of:

1. A written statement, signed by Virgle Sanders, stating that he had met "Slick" about six months" before the murder date. (PCR. 7, 12.)

   An FBI report on the prison record of petitioner Moore, also in the State's possession, showed that he was incarcerated in the federal penitentiary at Leavenworth, Kansas, from August 23, 1957 until March 4, 1962, and could not have been the man known to Sanders as "Slick" during the time indicated by Sanders' statement. (PCR. 8, 12.)[2]
2. A photograph of one James E. "Slick" Watts, an early and prime suspect for whom the police initially searched.[3]

---

[1] Neither witness corroborated the testimony of the admission itself. Witness Fair merely identified defendant as "resembling" the man in question. He further testified to giving that man and another a ride in his car, during which one of the men (not identified) remarked of "trouble with the bartender in Lansing." (TR. 605.)

[2] Lieutenant Turbin of the Lansing Police Department testified that this material was in the police file, of which he had custody during the course of the trial as aid to the prosecuting assistant State's Attorney. (PCR. 5-6.)

[3] Lieutenant Turbin was specifically assigned to locate "Slick" Watts shortly after the police obtained the statement of Virgle Sanders implicating "Slick" in the murder. (PCR. 299-300.) The picture apparently was turned over to the State's Attorney's office along with the rest of the file. (PCR. 251.)

3. A remark by Virgle Sanders, shortly before his trial testimony, that the man he knew as Slick did not wear glasses and was thirty to forty pounds heavier than Moore.[4] (PCR. 130.)
4. The negative identification of a photograph of Lyman A. Moore as "Slick" by William Leon Thompson in early November, 1962.[5]
5. The identity of another man, Delbert Jones, who knew and could identify "Slick."[6]

---

[4] This remark was made to an unidentified Lansing police officer. (PCR. 130-131.) It was apparently not communicated to any of the presiding state officials, Lieutenant Turbin, or Mr. Mack or Mr. Fleming, the prosecuting attorneys. Virgle Sanders had not previously viewed the defendant for identification during the two years period between Moore's arrest and trial. (PCR. 129.) Moreover, the accompanying police officer apparently allayed any doubts Sanders might have had by replying, "You know how those jailhouse beans are." (PCR. 131.) Cf. *Foster* v. *California*, 394 U.S. 442.

[5] The substance of Thompson's negative identification was reported orally by Lieutenant Turbin to Mr. Fleming, the assistant State's Attorney in charge of the prosecution of Moore. (PCR. 63.) Thompson never viewed Moore in person. (PCR. 84.) During the course of the investigation, moreover, Thompson was not asked to identify the police department's photograph of James E. "Slick" Watts. Subsequent to trial, when shown photographs of that suspect, Watts, Thompson gave a positive identification. (PCR. 80-83.)

[6] The police never attempted to have Delbert Jones identify Moore, either through photographs or at a lineup. (PCR. 255, 336-337.) After trial, at the request of defense counsel, Jones viewed Moore's picture and Moore personally and said that he was not the man. (PCR. 333, 337.) Jones did give a positive identification of "Slick" Watts as the "Slick" in question when showed a photograph by defense counsel. (PCR. 248-249.)

These items of information and evidence were not disclosed to the defense or to the court.[7] Specifically, the statement of Virgle Sanders was never given to the defense, despite the prosecutor's stipulation prior to trial that he would "guarantee" disclosure of statements given by prosecution witnesses at the close of their direct examination. This representation had been made in response to the defendant's pre-trial motion for the production of witnesses' statements in the possession of the State's Attorney's office or the investigating police departments. (TR. 27-32.) Prior to the testimony of Virgle Sanders, the prosecution had furnished, without specific requests, the statements of the State's witnesses Patricia Hall and Henley Powell, thus complying with its pre-trial agree-

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[7] The opinion of the Supreme Court states that the prosecutor "showed his entire file to the defense attorney • • •." 42 Ill.2d 73, 80. In making this finding, the Court relied upon the declaration of the State's brief on appeal referring to the testimony given at the post-conviction hearing by the assistant State's Attorney, Mr. Fleming. (PCR. 201-202.) Since no reply brief disputing this assertion was filed, that conclusion was understandable. See, *e.g., Thomas* v. *United States,* 343 F.2d 49, 54 (9th Cir. 1965).

The delivery of the file was, however, flatly denied by defense attorney Horka to whom it was assertedly given. (PCR. 230-235.) The trial record supports the testimony of defense counsel that the contents of the file were not disclosed. Prior to trial, the prosecutor expressed opposition to disclosure other than the names of witnesses, and written statements of witnesses to be given at the close of direct testimony. (TR. 31-32, 41.) Early in trial, defense counsel requested certain statements taken by police officer Koppitz the night of the murder. (TR. 464.) The prosecuting attorney futilely objected that these were not among the statements agreed upon before trial and were not admissible. The colloquy which followed makes clear the entire file was not shown. (TR. 465-466)

ment. (TR. 507, 531.)[8] No pre-trial demand for disclosure covered the other items of information possessed by the State.

Other relevant facts are set forth in the argument hereinafter.

Summary of Argument

The constitutional prohibition on the knowing use of false evidence in a criminal trial is not limited to the deliberate use of technical perjury. It applies to any demonstrably erroneous evidence which may have had an effect upon the outcome of the trial. This rule is not limited to prosecutorial misconduct by investigative officials and the prosecutor's staff. Proof of both falsity and the knowledge of falsity may be made by circumstantial evidence, and it is the duty of this Court to review

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[8] It is clear that the prosecutor had not revealed his entire file. The only other reference to the prosecutor's file contained in the trial transcript is the comment of the prosecutor at the closing argument. (TR. 951.)

At the post-conviction hearing, Lieutenant Turbin who acted as the prosecutor's police assistant during trial, testified only that "in the court of law, anyone where they asked for a statement was given to the defense counsel in my presence. Anything that was in our file was given." (PCR. 51.) The judge at the post-conviction proceeding who had also presided at trial, made no ruling upon the contention that the file had been delivered to the defense. With regard to suppression, that judge simply indicated that, at trial, no specific requests were made and that, had they been made, they would have been granted.

Since the finding of fact by the Supreme Court was based not upon a ruling by the judge below assessing the credibility of the witnesses, but upon the transcript of proceedings, it is not binding upon this court as a factual determination. Moreover, in the circumstances, that finding appears to lack substantial support in the trial record and should, therefore, be disregarded.

that evidence independently. Proof of the falsity of the evidence may depend in part on evidence obtained after trial as well as that possessed at the time of trial. A conclusion that the State knowingly presented such evidence should be made when the State officials possessed evidence incompatible with the factual accuracy of the testimony given at trial. In such circumstances they should not be excused when the suspect testimony proves to have been false.

Even if the evidence fails to support the knowing use of false testimony in this case, the prosecution's failure to disclose the evidence violated due process. The evidence was favorable to the defense in casting serious doubt upon the accuracy of an important identification and in inculpating another suspect. This evidence would have been extremely useful to the defense as well as to the jury at trial. Under *Brady* v. *Maryland*, 373 U.S. 83, the prosecutor's failure to show the defense a prior extrajudicial statement which he had requested prior to trial placed upon the prosecutor the risk that the evidence contained in that statement could be used favorably by the defense. No request for additional items of evidence, including a non-recorded statement or photograph of another suspect, should be required when such evidence could not reasonably be anticipated by the defense. Due process required the disclosure of this evidence.

The trial in this case also violated basic notions of fairness because the prosecution was permitted to introduce evidence relevant, if at all, only to the punishment of the accused and which was highly prejudicial to the determination of guilt. This inherent prejudice was compounded when the prosecution permitted both the trial and appellate courts of the State to rely upon the clearly erroneous

possibility that the 16-gauge shotgun could have been the murder weapon. In a capital case, the defense should not be permitted to employ evidence totally irrelevant to proof of guilt to influence the jury. The only evidence which the constitution can permit is that which is reasonably competent to prove guilt. A state court, no less than the prosecution, cannot justify such action on the clearly erroneous ground that the weapon introduced "might have been" the murder weapon.

Finally, even if those actions do not require a new trial, petitioner's death sentence must be set aside for violating the clear ruling of this Court in *Witherspoon* v. *Illinois*, 391 U.S. 510.

I

PETITIONER WAS DEPRIVED OF DUE PROCESS WHERE

A. His Conviction Was Obtained Through An Identification Which State Officials Knew To Be Erroneous; and

B. The State Withheld Evidence Vital To An Effective Defense.

PETITIONER WAS DENIED DUE PROCESS WHERE THE STATE USED AN IDENTIFICATION WHICH IT KNEW WAS ERRONEOUS.

For over thirty years, this Court has recognized the principle that the Due Process Clause of the Fourteenth Amendment will not sanction a conviction obtained through the use of evidence known to be false.

> *Miller* v. *Pate*, 386 U.S. 1; *Napue* v. *Illinois*, 360 U.S. 264; *Alcorta* v. *Texas*, 355 U.S. 28; *Pyle* v. *Kansas*; 317 U.S. 213; *Mooney* v. *Holohan*, 294 U.S. 103.

This constitutional prohibition should apply whether the false factual assertion is the product of the witness' erroneous perception or a deliberate lie. Cf. *Miller* v. *Pate*, 386 U.S. 1; *Alcorta* v. *Texas*, 355 U.S. 28. Inquiry into the subjective state of witness' mind to determine his actual knowledge or belief merely adds a ponderous factual element which is tangential to due process considerations. The fundamental concern must lie with the objective accuracy of the evidence presented to the fact finder. The good or bad faith of the witness in making a factual assertion has no effect upon the accuracy or inaccuracy of the evidence given. Each may lead to an unjust conviction.

A mistaken identification which is knowingly offered as "truth" impairs the integrity of the system of justice.[1]

Proof of "knowledge" of falsity on the part of the prosecution is, of necessity, a speculative endeavor. Only in the most unusual case where the official charged admits his direct involvement, can subjective "knowledge" of the evidence's falsity be found with any certainty.[2] For the prohibition to be an effective remedy of unjust convictions and a prophylactic against governmental foul play, it should not depend upon the virtual admission of the official's knowledge of certain falsity.[3] Where the prosecution possesses evidence which, if true, clearly refutes the accuracy of material testimony, the test of "knowledge" should be deemed satisfied. A prosecution possessed of such information, which permits testimonial assertions of fact to stand unclarified or uncorrected, improperly substitutes its own conclusions on the truth and accuracy of the facts for those of the jury. Use of such testimony in those circumstances effectively misrepresents the facts of the case to an extent as great as that gound violative of due process in *Alcorta* v. *Texas,* 355 U.S. 28, or *Miller* v. *Pate,* 386 U.S. 1.

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[1] See *Hamric* v. *Bailey,* 386 F.2d 390, 394 (4th Cir. 1967); cf. *United States* v. *Kaplan,* 101 F.Supp. 7 (S.D. N.Y. 1951); see generally Carlson, "False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?" 1969 Duke L.J. 1171, 1186, note 42. But cf. *Johnson* v. *Bennett,* 386 F.2d 677, 680 (8th Cir. 1967), vacated and remanded on other grounds, 393 U.S. 253, reversed on other grounds, 414 F.2d 50 (8th Cir. 1969).

[2] *E.g., Napue* v. *Illinois,* 360 U.S. 264; *Alcorta* v. *Texas,* 355 U.S. 28; cf. *Miller* v. *Pate,* 386 U.S. 1.

[3] See *United States ex rel. Montgomery* v. *Ragen,* 86 F.Supp. 382, 390 (N.D. Ill. 1949).

Such a test for prosecutorial knowledge does not impose undue burdens upon the prosecution. Due diligence in the investigation and preparation of a case will bring these facts to light. Ordinary intelligence is all which is necessary to ascertain their weight. A fair and impartial concern for justice, rather than a myopic quest for conviction, should lead the State to recognize that presentation of such witness' testimony creates a significant threat to the accuracy of the factual determination upon which guilt or innocence rests. Where ample notice of a real risk of false evidence exists, the prosecution should not be permitted to avoid the conclusion of "knowledge" of the falsity of that evidence.

Moreover, inquiry into the prosecution's knowledge of the falsity of its evidence must not cease with the actual knowledge of the prosecutor. In *Pyle* v. *Kansas*, 317 U.S. 213, this Court held that the due process clause would be violated where the wrong was done by "local authorities" and "State Police," even though the prosecuting attorney at trial was ignorant of the perjured character of the evidence presented at trial. Cf. *Hysler* v. *Florida*, 315 U.S. 411, 413. As Judge Soboloff has observed:

> The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the

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See, *e.g.*, *United States* v. *Bailey*, 439 F.2d 642, 650 (D.C. Cir. 1971); *Curran* v. *Delaware*, 259 F.2d 707, 712-713 (3d Cir. 1958); *United States* v. *Consolidated Laundries*, 291 F.2d 563, 570 (2d Cir. 1961); *Smith* v. *Florida*, 410 F.2d 1349 (5th Cir. 1969); *Imbler* v. *Craven*, 298 F.Supp. 795 (C.D. Cal. 1969), *affirmed*, 424 F.2d 631 (9th Cir. 1970), *certiorari denied*, 400 U.S. 865; *Nash* v. *Purdy*, 283 F.Supp. 837, 841 (D.C. Fla. 1968); *Evans* v. *Kropp*, 254 F.Supp. 218, 222 (D.C. Mich. 1966); *Maryland* v. *Giles*, 239 Md. 458, 212 F.2d 101 (196); *Hale* v. *Indiana*, 248 Ind. 630, 230 N.E.2d 432 (1967); *Arizona* v. *Fowler*, 101 Ariz. 561, 422 F.2d 125 (1967).

> State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant.

Barbee v. *Warden, Maryland Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964).

The ultimate determination of the falsity of the evidence and the State's knowledge of that fact rests with this Court. In *Napue* v. *Illinois*, 360 U.S. 264, 271-272, this Court observed that:

> [t]he duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Cooper* v. *Aaron*, 358 U.S. 1.[5]

Any determination of the truth or falsity of testimonial evidence involves the balanced conclusion of probabilities. In this case, the evidence renders it "most probable" that Virgle Sanders' trial identification of Moore as "Slick" was factually erroneous. *Had the jury known that Moore was in prison when "Slick" was previously seen by Sanders, the jury might well have concluded, as indeed it should have, that Sanders was wrong. Moore might well have been acquitted, as, again, he should have been in the circumstances.*

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[5] See also, e.g., *Lyons* v. *Oklahoma*, 322 U.S. 596, 602-603; *Gallegos* v. *Nebraska*, 342 U.S. 55, 60-61; *Brooks* v. *Florida*, 389 U.S. 413, 415. Cf., *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285; *Greenbelt Cooperative Publishing Co.* v. *Bresler*, 398 U.S. 6; *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265.

Inquiry into the falsity of the witness' testimony is not confined to facts established at or prior to trial. See, *e.g.*, *Miller* v. *Pate*, 386 U.S. 1, 5; cf. *Blackburn* v. *Alabama*, 361 U.S. 199, 211.

Sanders' initial, written statement to police ascribed his first meeting with "Slick" to a time well before Moore was released from federal prison. His testimony at the post-trial hearing generally confirmed the "fact" that Sanders met "Slick" *approximately six months before the murder, and four months before Lyman Moore's release from Leavenworth.*

At the end of his cross-examination, Sanders admitted his error:

> Q. And did you tell me and also later on, did you tell the policeman from the State's Attorney's Office that if you had known that this fellow, Lyman Moore, was in the Federal Penitentiary until March 4, 1962, you would definitely not have identified him as being Slick that you knew?
>
> A. If he's in jail, it would have been impossible to be the same man.

(PCR 133.)

The factual impossibility of a correct identification of Moore as "Slick" suggested by that inconsistency is corroborated by Sanders' acknowledgment of physical discrepancies in weight.

Sanders was also unable to reach any definitive conclusion with respect to James E. "Slick" Watts:

> Q. I am now going to show you a picture, which has been admitted here as Petitioner's Exhibit 7, and I ask you if that is a picture of Slick. Tell the Judge to the best of your ability, is that Slick?
>
> A. I'm going to tell you the truth, Your Honor. I just honestly don't know. The guy I knew had a

brush haircut, but it was long, and this guy isn't. It's more of a round face.

Q. You don't know for sure if this is him, and you can't say it isn't, can you."

A. That's right.

Q. You can't say either way?

A. That's right.

(PCR 134.)

Additional refutation of the identification exists in the form of the negative identifications supplied by William Leon Thompson and Delbert Jones, the other acquaintances of "Slick." The record of the post-conviction hearing further reveals that both William Leon Thompson and Delbert Jones identified James L. Watts as the same "Slick" who frequented the bars in that area during the fall of 1961. (P.C.R. 76-77, 83-84, 246, 255.) Added to the evidence supplied by Sanders himself, this testimony clearly establishes that Sanders' identification of Moore as "Slick" was erroneous.

The record also discloses that, at the time of Moore's trial, the State officials present at that proceeding possessed evidence from which they must have inferred that Sanders' testimony was false.

The uncontradicted testimony at the post-conviction hearing indicates that the State's prosecutor possessed and was well aware of Virgle Sanders' statement. Mr. Fleming testified that he read Sanders' statement to him during the course of pretrial preparation. (PCR 201.) In addition, the prosecutor's file contained the FBI report on the defendant's record. (PCR 6.) The record also established through the uncontradicted testimony of Lieutenant Turbin that the prosecutor had been informed that William Leon Thompson had been unable to identify Moore as "Slick," although he was acquainted with "Slick." (PCR 63.)

Lieutenant Turbin of the Lansing, Illinois, Police Department was present at the trial itself as a member of the prosecutor's staff. Acting as the advisory investigating police officer, it was his responsibility to counsel the prosecutor on factual matters, including calling to the prosecutor's attention pertinent factual omissions. (See PCR 198-199.) He handed the assistant State's Attorney relevant documents from the prosecution's file. (PCR 199-200.) He admitted that he was familiar with the contents of that file, including the items at issue on this appeal. (PCR 5ff.)

Turbin was instrumental in the investigation of the murder of Bernie Zitek from its inception. He was initially assigned to locate the original suspect, James E. "Slick" Watts. After that investigation focused on petitioner Moore, he assisted in the preparation of the prosecution's case. During the preparation of that case, he attempted to obtain evidence substantiating the potential identification of Moore as "Slick" by Sanders and was aware that Thompson had been unable to corroborate that identification. Turbin was also present when Sanders remarked on the weight discrepancy. (PCR 130.) By uncontradicted testimony, he was also present at the trial.

The pivotal question in determining the "knowledge" of the prosecution in this case is whether any state official can be inferred to have known, or held to knowledge of, the fact that Virgle Sanders' statement to police indicated that he met "Slick" at a time when Moore was imprisoned. If knowledge of that "fact" can be ascribed to the State, the combination of that element with other information known to the prosecution should be held sufficient knowledge of falsity to constitute a denial of due process.

Knowledge, whether actual or presumed as a matter of law, in this case requires the combination of the knowledge

of the criminal record of Moore with the facts contained in Moore's statement. Both the prosecutor, and certainly Lieutenant Turbin, may be presumed to have known Moore's prior confinement by virtue of their possession of the FBI record. Especially with respect to Lieutenant Turbin, this presumption is fortified by the inferences attendant upon long and intimate association with the investigation, both prior to and after Moore's arrest. During virtually the entire investigation of Moore, the Lansing Police possessed that record. The importance of Sanders' testimony and his identification of Moore as "Slick" led the prosecution to seek additional corroboration from Thompson. Only by willfully disregarding the material in its own file could the State have failed to be aware of the fact that Moore had been in prison at the time Sanders claimed to have met "Slick."

As Judge Ferguson stated in *Imbler* v. *Craven,* 298 F.Supp. 795, 807-811 (C.D. Cal. 1969), affirmed 424 F.2d 631 (9th Cir. 1970), certiorari denied, 400 U.S. 965:

> "While the prosecutor claimed not to have disbelieved these outright lies, he clearly had cause to suspect them. The reckless use of highly suspicious false testimony is no less damaging or culpable than the knowing use of false testimony, and a conviction based upon such evidence must suffer the same consequence.
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> * * *
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> "* * * The prosecutor either had reason to believe or in fact knew that each item of evidence * * * was untrue. The state cannot now disclaim knowledge of such falsity on the ground that its agent, the prosecutor, ignored the facts before him or that the investigating officers failed to disclose those facts to him. Due process of law does not tolerate a prosecutor's selective inattention to such significant facts. It requires that he exercise good faith in prosecuting that

case. Such good faith is not fulfilled where the prosecutor allows his witness to give false testimony of which he has advance knowledge and the accuracy of which he has reason to suspect. The duty of good faith is not merely a negative one, to omit from one's case outright lies. It imposes as well an affirmative duty to avoid even unintentional deception and misrepresentation, and in fulfilling that duty the prosecutor must undertake careful study of his case and exercise diligence in its preparation, particularly where he is confronted with facts tending to cast doubt upon his witness' testimony. The prosecutor's objective is justice; his role is not that of a mere advocate."[9]

B. The State's Failure to Disclose Favorable Evidence to the Defense Violated Due Process

1) The Prosecution Withheld the Requested Extrajudicial Statement of Virgle Sanders in Violation of Due Process of Law.

In *Brady* v. *Maryland*, 373 U.S. 83, the majority of this Court reviewed its earlier decisions touching on suppression of evidence and declared approval for the rule that

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[9] See also *Wild* v. *Oklahoma*, 187 F.2d 409, 410 (10th Cir. 1951) (dictum indicating that the Constitution is violated by use of evidence which is false and which the state "had reason to believe was false or perjured."); *McMullen* v. *Maxwell*, 3 Ohio St. 2d 160, 168, 209 N.E. 2d 449, 455 (1965) (holding that where "the prosecutor knows or has good reason to believe that the testimony is false, he must either disclose the falsity of the testimony or make available to the defense the means to do so.")

It has been persuasively argued that the requirement that state investigatory or prosecutorial officials know of the falsity of the evidence at the time of trial should be dispensed with. Carlson, *False or Suppressed Evidence: Why the need for the Prosecutorial Tie?*, 1969 Duke Law. J. 1171, 1185-1186. See also, *Darley* v. *Mayo*, 351 U.S. 277, 285 (dissenting opinion).

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 393 U.S. at p. 87.

In *Brady,* the defense had made a pre-trial request for the extrajudicial statements of an accomplice. Two signed statements were produced, but a third unsigned statement was withheld, assertedly on the ground that it was not admissible.

The facts in the instant case are not materially distinguishable. Here, the statement of Virgle Sanders was never given to the defense, despite the prosecutor's stipulation prior to trial that he would "guarantee" disclosure of statements given by prosecution witnesses at the close of their direct examination. This representation had been made in response to the defendant's pre-trial motion for the production of witnesses' statements in the possession of the State's Attorney's office or the investigating police departments. (TR. 27-32.)[10] Prior to the testimony of Virgle Sanders, the prosecution had furnished, without specific requests, the statements of the State's witnesses Patricia Hall and Henley Powell, thus complying with its pre-trial agreement. (TR. 507, 531.)

In these circumstances, the failure of the defense to repeat its request during the trial itself with specific reference to Virgle Sanders' statement should not excuse

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[10] The defendant also filed other broad demands for the production of evidence in the prosecutor's possession, including "Police station complaint book, to and from reports, lock-up keeper records, and all other reports and documents in connection with the above indictment." These requests were denied. (Common Law Record 54-56).

the suppression of that statement. The purpose of a request is to alert the prosecution of the pertinence and need of the information for the defense. *United States* v. *Keogh,* 371 F.2d 138, 147 (2d Cir. 1968).

Assuming that the prosecution was justified in withholding the extrajudicial statements until the trial itself, it can make no contention that it lacked notice in this case. The prosecutor had already supplied the statements taken from the preceding identifying witness without any additional demand. His failure to supply Sanders' statement might well have been construed by defense counsel to indicate that there was in fact no statement in the State's possession.[11] The State should not be excused for failing to comply with its admitted duty because the defense did not specifically remind it of that fact at every corner. The risk of error in failing to disclose the statement must be placed on the shoulders of the prosecution.

The Statement of Virgle Sanders contained evidence favorable to the accused and was material to the determination of his guilt. No distinction should be drawn between the prejudice required to set aside a conviction where the State has improperly withheld evidence on demand and other improper government handling of evidence. The absence of this evidence "may have had an effect on the outcome of the trial." *Napue* v. *Illinois,* 360 U.S. 264, 272. It tended to discredit the identification of Moore by Sanders, and the jury "might well have" accepted Moore's alibi defense. *Alcorta* v. *Texas,* 355 U.S. 28, 33.

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[11] Compare *United States ex rel. Thompson* v. *Dye,* 221 F.2d 763 (3 Cir. 1955), certiorari denied, 350 U.S. 875; *Jackson* v. *Wainwright,* 390 F.2d 288, 298 (5th Cir. 1968).

2) The Absence of a Request Did Not Justify the State's Failure to Disclose Evidence Significantly Favorable and Useful to the Determination of Guilt.

Defense counsel's failure to request disclosure of the remaining items of evidence in this case should not foreclose the conclusion that the suppression of that evidence rendered the trial unjust. Considerations of fundamental fairness to the accused particularly in a capital case, as well as practical realities bearing upon a request for disclosure of evidence, militate against making such a request the *sine qua non* of a constitutional rule.

The disclosure of evidence should not hinge exclusively upon the ability of the defense counsel to anticipate or surmise the wide range of possible favorable evidence which the State's investigation may have uncovered. Where the circumstances of the case make it unlikely that the defense could anticipate or guess and request disclosure of the evidence in question, it would add to the unfairness of the trial to penalize the defense for its failure to make a request. In such circumstances, speculation over whether the defense might have ascertained the evidence or the possibility of evidence should not outweigh the fundamental concern for a fair trial.[12] Automatically to excuse officials from an obligation imposed upon them by reason of their

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[12] See, *e.g., Levin* v. *Katzenbach,* 363 F.2d 287, 291 (D.C. Cir 1966); *United States ex rel. Meers* v. *Wilkins,* 326 F.2d 135, 140 (2d Cir. 1964); *Barbee* v. *Warden, Maryland Penitentiary,* 331 F.2d 842, 845-846 (4th Cir. 1964); *Arizona* v. *Fowler,* 101 Ariz. 561, 422 P.2d 125 (1967); cf., *e.g., United States* v. *Soblen,* 301 F.2d 236, cert. denied, 370 U.S. 944 (2d Cir. 1962); *Webb* v. *Beto,* 362 F.2d 105 (5th Cir. 1966), *cert. denied,* 385 U.S. 940, *rehearing denied* (5th Cir. 1966), *cert. denied,* 385 U.S. 940, *rehearing denied,* 386 U.S. 930.

superior knowledge in such circumstances is inconsistent with the very rationale which creates that duty. Such a requirement would place an unfair burden upon the defendant which is not commensurate with the relative abilities to obtain evidence of the state and the accused. Even where a request might lend assistance to the prosecutor in ascertaining or insuring the disclosure of favorable evidence, the very ignorance of the accused would render it impossible for the defense to know what to request in order to remedy its ignorance. This is especially true in light of the narrow scope of pre-trial discovery. A request may thus become a substitute for discovery, or a game of wits played by opposing counsel.

A request should also be unessential where it would have been futile. Thus, where the evidence has been withheld from the prosecutor himself, a request for its disclosure would in all likelihood be unavailing.[13] Similarly, where the State itself has not obtained the evidence until late in the proceedings, the failure of the defense to request the item in question should not preclude itself. So, also, events which occur during the prosecutor's preparation or at the trial may serve the purpose of the request by flagging the evidence for the prosecution.[14]

Absent a request, due process considerations nevertheless require a State to disclose evidence which, in the cir-

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[13] *E.g., Barbee* v. *Warden, Maryland Penitentiary;* 331 F.2d 842, 846 (4th Cir. 1964); see also *Clements* v. *Coiner,* 299 F. Supp. 752, 758 (S.D.W.Va. 1969).

[14] *E.g., United States* v. *Miller,* 411 F.2d 825, 831, 832 2d Cir. 1969).

cumstances of the case, is highly favorable and useful to the defense on material issues of guilt.[15]

The goal of the criminal process, culminating in an adversary trial, is the determination of factual truth: The concern for the accuracy of the ultimate factual determinations upon which a conviction rests lies at the heart of the notion of fundamental fairness embodied in the Due Process Clause of the Constitution.[16] The Constitution guarantees the defendant determination of these issues by an impartial and informed tribunal, judge or jury. *In re Murchison*, 349 U.S. 133, 136; *Turner* v. *Louisiana*, 379 U.S. 466, 471-473. Where state officials, prosecutorial or investigative, withhold material evidence favorable to the

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[15] *E.g.*, *Levin* v. *Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966); *United States ex rel. Meers* v. *Wilkins*, 326 F. 2d 135 (2d Cir. 1964); *Barbee* v. *Warden, Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964); *Jackson* v. *Wainwright*, 390 F.2d 288 (5th Cir. 1968); *Clarke* v. *Burke*, 440 F.2d 853 (7th Cir. 1971); *Thomas* v. *United States*, 343 F.2d 49 (9th Cir. 1965); *Arizona* v. *Fowler*, 101 Ariz. 561, 442 P.2d 125 (1967); *Smith* v. *Urban*, 245 Ark. 781, 434 S.W.2d 283 (1968); *Hale* v. *Indiana*, 248 Ind. 630, 230 N.E.2d 432 (1967); *Wisconsin* v. *Cathey*, 32 Wis.2d 79, 145 N.E.2d 100 (1966); *Link* v. *United States*, 352 F.2d 207, 212 (8th Cir. 1965), *cert. denied*, 383 U.S. 915.

[16] See, *e.g.*, *Foster* v. *California*, 394 U.S. 440, 442; *Chandler* v. *Fretag*, 348 U.S. 3; cf. *Simmons* v. *United States*, 390 U.S. 377, 383; *Ungar v. Sarafite*, 376 U.S. 575. Many of the guarantees set forth in the Bill of Rights and made recently obligatory upon states through the Fourteenth Amendment's Due Process Clause reflect this principle. See, *e.g.*, *Duncan* v. *Louisiana*, 391 U.S. 145; *Washington v. Texas*, 388 U.S. 14; *Klopfer* v. *North Carolina*, 386 U.S. 213; *Pointer* v. *Texas*, 380 U.S. 400; *Gideon* v. *Wainwright*, 372 U.S. 335.

defense, they assume a role of fact-finder which the Constitution reserves for others. Their action directly threatens and impairs the accuracy of the determinations to be made. The concealment of such evidence, whether involving active misrepresentation or passive non-disclosure of exculpatory evidence, places the prosecution "in the role of an architect of a proceeding that does not comport with standards of justice." *Brady* v. *Maryland*, 373 U.S. 73, 88.

The position of State prosecuting and investigative officials imposes upon them a duty, not simply to convict, but to see that justice is done. Cf. *Mesarosh* v. *United States*, 352 U.S. 1, 14; *Berger* v. *United States*, 295 U.S. 77, 78.[17] They cannot rely upon the defendant to obtain and produce at trial the full range of evidence contradicting proof of guilt. As Judge Palmieri observed in *Application of Kapatos*, 208 F. Supp. 883, 888 (S.D.N.Y.):

> The purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one. The average accused usually does not have the manpower or resources available to the state in its investigation of the crime. Nor does he have access to all of the evidence, much of which has usually been removed or obliterated by the time he learns that he is to be tried for the crime. In view of this disparity between the investigating powers of the state and the defendant, I do not think it imposes too onerous a burden on the state to require it to disclose the

[17] See Canon 5 of the American Bar Association Canons of Professional Ethics: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing innocence of the accused is highly reprehensible." See also *Jackson* v. *Wainwright*, 390 F.2d 288, 294-295 (5th Cir. 1968).

existence of a witness of the significance of Danise in the instant case.[18]

The duty of the State to disclose evidence favorable and essential to the defense acknowledges that imbalance. Its impact upon the defense is paramount where, as here, the alleged crime is a capital offense. See *Curran* v. *Delaware*, 259 F.2d 707, 711 (3d Cir. 1958):

> The focus must be on the character of the evidence and its potential impact on the factual conclusions of the trial. This focus is of particular pertinence where the evidence in question contradicts or casts doubt upon the truth of evidence presented by the prosecution. In such instances, the duty of disclosure is reinforced by the prosecutor's responsibility for the truth of the evidence which he presents. Even though the State may lack certain proof that testimony is false, it should be obliged to disclose evidence which substantially undermines or refutes the evidence which it submits.

In light of these considerations, the failure of the defense to request disclosure of the evidence in this case should not be dispositive of his constitutional claim. The refusal of the prosecutor to supply Sanders' extrajudicial statement prior to trial effectively foreclosed the defense's ability to ascertain the pertinence of "Slick" to the case or the existence of "Slick" Watts as a suspect. Although a list of potential witnesses were supplied, there is nothing to suggest that defense counsel should have been expected to ascertain from those witnesses any of the evidence at issue here. There is no suggestion that defense counsel,

[18] See also Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1192 n. 1; Note *The Prosecutor's Constitutional Duty to Real Evidence to the Defendant*, 74 Yale L.J. 136, 142-143 (1964).

in these circumstances, could reasonably have been expected to request disclosure of the negative identification given by William Leon Thompson.

Similarly, the failure of the defense to request disclosure of the oral statement of Virgle Sanders at the trial should not be dispositive. Such a request would, in all likelihood, have been futile. Moreover it occurred at such a late stage in the proceeding that it would be unfair to expect the defense to investigate such an occurrence.

a. The Requirement of Disclosure of Favorable and Useful Evidence Applies to All State Officials Connected With the Prosecution

It should also be irrelevant that some or all of the favorable evidence was not possessed by the prosecutor as such. The requirements of due process apply to all State officials. The suppression of evidence by the State's investigative officials or prosecutorial staff prejudices the defendant's ability to obtain an accurate determination of the facts of his case to the same degree as suppression by the prosecutor himself.

Thus, in *Pyle* v. *Kansas*, 317 U.S. 213, this Court held that due process was violated where such officials knowingly used prejudicial testimony and deliberately suppressed evidence favorable to the accused. Where the State official is involved in the investigation of a crime or the preparation of the case, he is a part of the "prosecution," and favorable evidence which is in his possession rather than the prosecuting attorneys should be relevant to a determination of the fairness of the trial.[19]

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[19] *Barbee* v. *Warden*, 331 F.2d 842, 846-847 (4th Cir. 1964); *Bryant* v. *United States*, 439 F.2d 642, 650-651 (D.C. Cir. 1971); *Imbler* v. *Craven*, 298 F. Supp. 795 (C.D. Cal. 1969), *affirmed*, 424 F.2d 631 (9th Cir. 1970),

The function of investigative officials is to discover the facts. Clearly, their duty is not to convict but to ascertain the true facts. To an even greater extent than the prosecutor, their position during an investigation thus requires impartiality and candor. The very ability of the prosecutor to function properly depends upon the full disclosure by the State's investigators not only of evidence which inculpates an accused, but of evidence which is inconsistent with guilt and which derogates from proof of guilt. Lacking such information he cannot make a truly informed decision to prosecute. Nor can the prosecutor effectively direct the final preparation and presentation of the State's case.

Implementation of the prosecutor's duty to disclose evidence which is materially favorable to an accused strengthens the need for disclosure by the police. The rationale upon which that duty rests is the superiority of the State, through its investigative forces to acquire knowledge. More than merely adventitious disclosure of such evidence by those officials to the prosecutor himself should be required. Knowledge of the "prosecution" must accordingly include the knowledge of favorable evidence possessed by all State officers involved in investigating and prosecuting the case.

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[19] (Continued)
cert. denied, 400 U.S. 865; *Evans* v. *Kropp,* 254 F. Supp. 218 (D.C. Mich. 1966); *Walker* v. *Bishop,* 295 F. Supp. 767 (D.C. Mich. 1967), *affirmed,* 408 F.2d 1378 (8th Cir.); *Hale* v. *Indiana,* 248 Ind. 630, 230 N.E.2d 432 (1967); *Giles* v. *Maryland,* 239 Md. 458, 212 A.2d 101 (1965), *vacated on other grounds,* 386 U.S. 66; *Cheatwood* v. *Colorado,* 435 P.2d 402 (1968). See also *Smith* v. *Florida,* 410 F.2d 1349, 1350-1351 (5th Cir. 1969).

This case presents especially strong grounds for such a conclusion. All the items of evidence in question were known to the same police official, Lieutenant Turbin. He was involved in the investigation and prosecution of this case from shortly after the murder to the culmination of the trial. He was present at the trial itself, acting as the advisory assistant to the prosecution. Even when courts have drawn a distinction between the police and prosecutorial duties of disclosure, they have recognized that a state official acting in such a capacity may be bound by the duty to disclose exculpatory evidence.[20] He is as much a prosecuting officer as the state's attorney himself. He is capable of assessing the value of evidence and its probative implications. He is able to appreciate evidence which contradicts or is inconsistent with the truth of a witness' declarations or proof of guilt. No distinction should be drawn between the prosecutor and such an assistant in terms of the State's responsibility to disclose favorable evidence on material issues.

b. Disclosure Must be Made of Unrecorded as Well as Recorded Evidence.

The fact that certain of the evidence claimed to be favorable to the defense was not recorded should not affect the requirements of disclosure.

The form in which favorable evidence possessed by the prosecution exists should not detract from its duty to disclose that evidence.

The thrust of the prohibition is toward disclosure of the evidentiary facts which cast light on the guilt or in-

[20] See *Bowles* v. *Texas*, 366 F.2d 734, 738 (5th Cir. 1966); *Luna* v. *Beto*, 395 F.2d 35, 41 (5th Cir. 1968) (*en banc*), (concurring opinion), *cert. denied*, 394 U.S. 966.

nocence of the accused. The government is no less informed or possessed of the facts comprising evidence favorable to the defense where that evidence is unrecorded than when it has been transcribed. In every practical sense, evidence is no less evidence because it is not in documentary form. Where the state possesses the factual evidence of potential testimony, its failure to record that or place it in a form which would itself be admissible as formed "evidence" should have no effect on the constitutional issues raised by its failure to disclose that evidence. Such a distinction would elevate form over substance and would encourage, rather than discourage, both governmental evasion and poor prosecutorial and investigatory practices.

By the same token, the relevance of a request should not automatically vanish where the evidence has not been recorded. The same value attaches to a request in both circumstances, and the same considerations may attend a defendant's failure to request. Where, however, the defense may have been misled into believing that the state's favorable evidence had been revealed by disclosure of recorded evidence, the failure of the defense to request that evidence should not be considered. Thus, where a prosecutor reveals all or a substantial portion of the state's files, a defendant may incorrectly infer that all favorable evidence has been recorded. Even if unintentional, such action should relieve the defense of any responsibility for further requests.

c. The Evidence was Favorable to the Defense and of Substantial Relevance to Material Issues of Guilt.

In the context of this case, the evidence withheld by the State, considered separately and as a group, was favorable

to the accused on material issues of guilt. It held substantial importance to the defense and to the jury's ability to make an informed and accurate assessment of the facts.

This evidence consisted of the extrajudicial statements of Virgle Sanders, both written and oral, the unrecorded negative identification of Moore as "Slick" by William Leon Thompson, and the identity and photograph of the suspect, James E. "Slick" Watts.[21]

The testimony of Virgle Sanders constituted a significant link in the prosecution's case. If believed, it established Moore as having virtually admitted the crime charged to an acquaintance only a few days after the murder took place. At the heart of that testimony lay the identification of Moore as "Slick." In the context of this case, therefore, the identification of Moore by Sanders, virtually unchallenged at trial, carried nearly the same significance as the other eyewitness identification supplied by Patricia Hall and Henley Powell. The undisclosed evidence tended to destroy Sanders' identification of Moore and to suggest a defense unexplored at trial.

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[21] Clearly the written extrajudicial statement of Virgle Sanders and the photograph of Watts were admissible documents. The other, unrecorded hearsay evidence could, however, have been admitted, either as *res gestae* in the case of Thompson's identification or as a part of cross examination of Sanders. Whether or not admissible in the form considered, this constituted testimonial evidence.

The contrary is the case for the identity of the potential identifying witness, Delbert Jones. The identity of the witness is not the same as his potential testimony. As information it would certainly have proved a useful and fruitful source of evidence. The failure to obtain potentially favorable evidence should not be equated with the failure to disclose that evidence. See *Peoples* v. *Hocker*, 428 F.2d 960, 964 (9th Cir. 1970).

At a minimum, the evidence at issue undercut the apparent certainty with which Sanders identified Moore.[22] The extrajudicial statements of Sanders strongly suggested that Moore could not possibly have been "Slick," the man Sanders originally described as relating the admission. The negative identification by William Thompson of Moore as "Slick," even if simply the failure of the witness to make an identification, also contradicted Sanders' testimony in the context of this case.[23] Finally, as Sanders' testimony of the post-conviction hearing indicates, the photograph of "Slick" Watts provided a further source for undermining that identification.

The combination of these items, particularly Sanders' April 30, 1962, statement to police and the photograph of James E. "Slick" Watts, would have provided another possible defense by inculpating one other than the accused. It is impossible to ascertain on this record the possible consequences upon the outcome of the case which might have flown from the defense's possession of Watts' pic-

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[22] This applies as well to the corroborative identification by witness Joyce who substantiated Sanders' testimony to the point of identifying Moore as being in the Ponderosa Tap on April 27, 1962. Robert T. Fair merely indicated that the defendant "looks like one of the men" in the bar. (TR. 602.) The testimony of the trio regarding the identification of Moore may well have been altered significantly had Virgle Sanders' identification been refuted or impeached.

[23] Even the absence of a positive identification was significant here in light of the fact that Sanders had never been asked to make an identification prior to trial. While a distinction might be drawn between a failure to identify a suspect positively and a prior negative response, no such distinction should be drawn here. In addition the evidence on the precise character of the response is uncertain due to the fact that the police officials never recorded the occurrence or its significance.

ture. Certainly this evidence would have provided a fruitful means of exploiting Virgle Sanders' testimony by arguing that Watts, not Moore, was the man who admitted the crime. In addition, the photograph would have been of value in cross-examination of both the State's eyewitnesses. Even though it is not possible on this record to determine whether they would have altered their testimony, the high valne and favorable implications which are suggested by this evidence should be sufficient to require disclosure.[24]

3) The Prosecution Did Not Satisfy its Duty to Disclose this Evidence.

The Illinois Supreme Court also indicated that the disclosure requirements of *Brady* were satisfied because the "prosecutor showed his entire file to the defense attorney." 42 Ill.2d 73, 80.

The record of the trial and post-conviction hearing does not, however, provide substantial support for that finding. The Illinois Supreme Court relied upon the declaration of the State's brief on appeal referring to the testimony given at the post-conviction hearing by the assistant State's Attorney, Mr. Fleming. (PCR. 201-202.)

The delivery of the file was, however, flatly denied by defense attorney Horka to whom it was assertedly given. (PCR. 230-235.) The trial record supports the testimony of defense counsel that the contents of the file were not disclosed. Prior to trial, the prosecutor expressed opposition to disclosure other than the names of witnesses, and written statements of witnesses to be given at the close of direct testimony. (TR. 31-32, 41.) Early in trial, defense counsel requested certain statements taken by

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[24] Cf. *Ashley* v. *Texas*, 319 F.2d 80 (5th Cir. 1963).

police officer Kippitz the night of the murder. (TR. 464.) The prosecuting attorney futilely objected that these were not among the statements agreed upon before trial and were not admissible; thereupon, the following colloquy took place:

The Court: He is asking for statements that he took from witnesses.

Mr. Fleming: You want us to give him those?

The Court: Yes.

Mr. Fleming: Give him the whole file.

Mr. Horka: I object to Mr. Fleming's dramatics.

The Court: Give him any statements he made. You are in possession of statements and he is just asking for the statements that he made.

Mr. Fleming: No, you misunderstand. That's my whole purpose. I would like to be heard on this because he is asking for all statements of all the witnesses, of the statements that he took.

The Court: What are you asking for Mr. Horka?

Mr. Horka: I am asking for anything that he wrote down at the time and place, at the scene.

The Court: When?

Mr. Horka: On April 25, 1962 or immediately thereafter.

The Court: In the tavern?

Mr. Horka: In the tavern or—

The Court: Or before he went to the tavern?

Mr. Horka: No, in the tavern immediately thereafter.

The Court: You may have them.

Mr. Mack: All right, Judge, at this time the State is furnishing to defense counsel a statement that this officer was present at and took from Mrs. Lorena Cooper, from Mr. Charles Davis, from Mr. Charles Mayer, from Mr. Henley Powell and from Mr. Donald O'Brien.

The Court: All right. Now he has them.

Mr. Fleming: Of course, Judge what is he going to do with them?

The Court: I don't know.

Mr. Fleming: He can't impeach this officer with them. (TR. 465-466.)

At this time, the prosecutor clearly had not revealed his entire file to the defense. Moreover, the colloquy indicates that he had no intention of doing so without a direction from the Court. The trial record contains no other affirmative indication that the prosecutor revealed any of the contents of his file with the exception of his delivery of the extrajudicial statements of the State's eyewitnesses, Patricia Hill and Henley Powell. The only other reference to that file contained in the trial transcript is the prosecutor's assertion during his closing argument that he had shown the defense his file. (TR. 951.)

Finally, a conclusion that the file was delivered to the defense cannot discharge the prosecution's duty where the evidence is not contained in the file. Thus, at a minimum, the negative identification made by William Leon Thompson and the oral comment of Virgle Sanders remained suppressed. Moreover, even assuming the prosecution's file to have been shown to the defense during trial, the circumstances under which it could be viewed might not permit a reasonable scrutiny by counsel to ascertain favorable information.

II

WHERE THE DECEASED WAS KILLED WITH A TWELVE-GAUGE SHOTGUN, THE INTRODUCTION AND USE OF A SIXTEEN-GAUGE SHOTGUN, TOTALLY UNCONNECTED WITH PETITIONER OR THE CRIME CHARGED, DENIED PETITIONER A FAIR TRIAL AND DUE PROCESS OF LAW.

As admitted in the prosecution's response to a motion for a bill of particulars (A. 2), the deceased was killed

with a twelve-gauge shotgun. The prosecution apparently had in its possession a report from the Chicago Police Scientific Crime Detection Laboratory indicating the gauge of the wadding taken from the deceased's body, but the report was not in the prosecution's file and was not introduced at trial (A. 130-138). At the close of petitioner's case, there was a stipulation that if the officer who made the report were called, he would testify that in his opinion the waddings came from a twelve-gauge shotgun shell (A. 139).

Nonetheless, the prosecution introduced into evidence over defense counsel's repeated objections (A. 81-93) a sixteen-gauge sawed-off shotgun taken from the back seat of a car belonging to petitioner's friend, on the occasion of petitioner's arrest some six months after the crime charged as he and his friend sought to enter the car (A. 57-61, 66-71, 74-80). The sawed-off barrel was subsequently recovered from beneath a bed in the friend's home (A. 77).

A. Prosecution Use of the Sixteen-Gauge Shotgun Inflamed the Jury and Denied Petitioner a Fair Trial and Due Process of Law.

Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. *Spencer* v. *Texas*, 385 U.S. 554, 563, 87 S. Ct. 648 (1966). In *Spencer*, this Court rejected a claim that inclusion of a defendant's prior convictions in an indictment read to the jury violated the defendant's right to due process of law; the valid state purpose of enforcing the habitual-offender act justified the use of what could be considered prejudicial information. 385 U.S. at 563. In the instant case the state had absolutely no legitimate interest to achieve which

could offset the highly prejudicial effect of the continued display of the irrelevant sixteen-gauge shotgun to the jury.

In *United States* v. *Harris*, 331 F.2d 185 (4th Cir. 1964), the Court stated:

> It is inconsistent with our traditional conception of a fair trial to permit the introduction of any evidence which might influence a jury to convict a defendant for any reason other than that he is guilty of the offense charged. 331 F.2d at 187.

There the court reversed a conviction for possession of nontaxpaid whiskey because evidence had been admitted which described the defendant as having a "record and reputation as a liquor law violator on a large scale."

In *Boyd* v. *United States*, 142 U.S. 450, 12 S. Ct. 292 (1892), this Court reversed a murder conviction under which the defendants had been sentenced to death because evidence of the defendants' participation in other crimes had been admitted.

> [Such evidence] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. * * * However depraved in character, and however full of crime their past lives have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged. 12 S. Ct. at 295.

Lyman Moore was entitled to no less.

The prosecution was less than completely honest when it introduced the shotgun into evidence. Despite its ad-

mission in the Bill of Particulars that the murder weapon was a twelve-gauge shotgun (A. 2) and despite the apparent possession of a laboratory report that the murder weapon was a twelve-gauge shotgun (A. 130-138), the prosecution still allowed and even contributed to the trial judge's mistaken impression that the sixteen-gauge shotgun could have been the murder weapon (A. 90-92).

Having successfully gotten the shotgun admitted into evidence, the prosecution made devastating use of it in securing a guilty verdict and death sentence for petitioner, as these excerpts from the prosecution's closing argument demonstrate:

> Mr. Fleming: Now, he stated to you about the most important witness in this case is this shotgun. And he said this shotgun was found again in a car that was not owned by this defendant. But it was a car that this defendant — and again this man with the mustache were arrested getting in the automobile.
>
> They say this is a 16, which it is, it is a 16. And we stipulated that the pellets, if the expert would have testified that in his opinion they would have been from a twelve-gauge shotgun. He said because this is a 16 and because the pellets came from a twelve-gauge shotgun, really this is the most important thing in this case.
>
> We never contended and we don't now, and the evidence doesn't show it, that this is the shotgun that killed Bernard Zitek. He said, well, this is the thing and the reason why you should go back and find this man not guilty.
>
> Lyman Moore, I submit to you, is that type of defendant that knows when he shoots a bartender and kills that bartender, about the only way for him to get out of it is to toss the shotgun, he shot the bartender with in a creek, bury it, burn it or something else, because he knows if he ever gets caught with that shotgun he is absolutely a goner.
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> • • •

> And take a look at those, folks, these are in evidence so you can look at them. You see this shell here, it has a ballbearing at the end of it. I wonder what they were going hunting for with this? Pheasants? You shoot deer with this in Wisconsin and Michigan. The other three are goose shot, number 4's. You shoot geese in Canada with that, you don't hunt pheasants in Illinois or target practice with these things, you kill things with this. There is a ballbearing at the end of this, and that is what was in this weapon when it was found in the car as Lyman Moore and this other man went to get into it. (A. 199-201).
>
> * * *
>
> Is the death penalty the type of penalty that is appropriate for shotguns loaded with ballbearings? Is the death penalty appropriate in this type of case where a weapon such as this, not a pistol, not a revolver, an automatic or a rifle, not a club was used but a hard, cold shotgun that shoots a slug about the size of this. Is this the type of case?" (A. 206).

The danger of prejudice in the use of physical but irrelevant evidence has long been recognized.

> Darling, *Scintillae Juris* 58 (1877): What is called 'real evidence' — mostly bullets, bad florins, and old boots — is of much value for securing attention. This is true even when these exhibits prove nothing, — as is generally the case. They look so solid and important that they give stability to the rest of the story. The mind in doubt ever turns to tangible objects. They who first carved for themselves a Jupiter from a log of wood knew very well that the idol could do nothing for them; but it enabled them easily to realize a power who could. A rusty knife is now to any English juryman just what a 'scarabaeus' was to an Egyptian of old. I have seen a crooked nail and a broken charity-box treated with all the

> reverence due to relics of the holiest martyrs [quoted in 4 Wigmore, Evidence § 1157 (3d ed. 140)].

The shotgun should never have been admitted into evidence; petitioner was denied a fair trial and due process of law because of it.

B. A Reversal of Petitioner's Conviction Would Not Involve This Court in Establishing Rules of Criminal Procedure for the State of Illinois.

In *Spencer* v. *State of Texas, supra,* this Court expressed reluctance at becoming established as a rulemaking organ for the promulgation of state rules of criminal procedure; "none of the specific provisions of the Constitution ordains this Court with such authority." Where reliance is placed upon general principles of "fairness", "the Court has always moved with caution before striking down state procedures". 385 U.S. at 563-565.

There is no such impediment to reversing petitioner's conviction in the instant case. There is no Illinois procedure which need be struck down. The Illinois rule on admission of weapons into evidence is clear—and constitutional:

> [A] weapon may be admitted in evidence where there is proof to connect it with the defendant and with the crime. However, it is not necessary to establish that the particular weapon was the one which was actually used. Where the proper connection is established and it is shown that the defendant possessed a weapon which could have been used in the commission of the crime, it may be admitted in evidence. *People* v. *Johnson,* 35 Ill.2d 516, 221 N.E.2d 497, 498 (1966).

In the present case neither did petitioner have possession of the gun (it was recovered from the back seat of

the friend's car and the sawed-off barrel was found at the friend's home), nor could the gun have been used as the murder weapon (the gun was sixteen-gauge and the murder weapon twelve-gauge).

The Illinois rule is elsewhere stated as being that the weapon may be admissible to show that the accused possessed a weapon suitable for the commission of the crime charged against him, even though no claim is made the accused actually used that weapon in committing the particular crime. *People v. Smith,* 413 Ill. 218, 108 N.E.2d 596, 597 (1952). In *Smith,* two sawed-off shotguns were held inadmissible, even though found in the trunk of the car defendants were driving when arrested, because the evidence disclosed the victim had been murdered with a certain caliber pistol; sawed-off shotguns were no more suitable for the commission of that crime than would have been an axe or a pistol of a different caliber.

In affirming petitioner's conviction, the Illinois Supreme Court dealt summarily with the admission of the shotgun:

> There is no clear evidence of the weapon actually used in this homicide, although it is clear that it was a shotgun. We have consistently held that a weapon found upon a defendant suitable for the commission of the crime charged is proper evidence even though there is no showing that it was the actual weapon used. 42 Ill.2d 73, 246 N.E.2d 299, 303 (1969).

Justice Schaefer, dissenting in the instant case, was unconvinced:

> In the cases cited by the majority no ballistic evidence was available, and therefore the suitability of the weapon for the commission of the crime charged could be established only by a physical description.

> In this case, however, the prosecution had ballistic test results in its possession throughout the trial which showed that Zitek was shot with a twelve-gauge shotgun. The shotgun received in evidence was thus as unsuitable for the commission of this murder as was the excluded .38 caliber revolver. 246 N.E.2d at 307.

The admission of the shotgun into evidence denied petitioner a fair trial and due precess of law; the Illinois rule regarding admission of weapons, if properly applied, does not. Hence, reversing petitioner's conviction does not mean that this Court need establish a new rule of criminal procedure for the State of Illinois.

C. Since Both Petitioner's Guilt and Punishment Were Determined in the Same Jury Proceeding, He Was Denied a Fair Trial and Due Process by the Prosecution's Use of Evidence Totally Unconnected with the Issue of his Guilt.

The Illinois legislature has authorized the jury to determine both guilt and punishment in capital cases. Ill. Rev. Stat., Ch. 38, § 1-7 (1969). The jury did so in the present case, fixing the penalty at death (A. 218). There is a special danger in admitting irrelevant and inflammatory evidence when the jury is faced with such awesome responsibility.

We do not propose another assault on the unitary trial system held constitutional in *Spencer* v. *Texas, supra,* and *McGautha* v. *California,* ..... U.S. ....., 91 S. Ct. ....., 28 L.Ed.2d 711 [1971]; issuance of mandate stayed pending disposition of the petitions for rehearing (6/28/71). What we do propose is that the prosecution be limited in the evidence it may introduce in unitary proceedings to evidence tending to establish the defendant's guilt.

The injustice inflicted upon petitioner in the instant case is obvious. There is absolutely no evidence linking the sixteen-gauge shotgun to the crime charged. The only thread tying petitioner to the gun is his approach to a friend's car from which the gun was taken. And the jury, with that sixteen-gauge shotgun staring them in the face, determined that petitioner must die. If such practice can be held to comport with the requirements of due process, then to paraphrase remarks attributed to petitioner by witnesses at his trial, it will be open season on defendants.

In *Spencer* v. *Texas, supra,* potentially prejudicial information was allowed to go to the jury, even though the jury could sentence the defendant to death, because it was felt that the state had a valid countervailing purpose in the enforcement of its recidivist statutes. 385 U.S. at 560-563. What could the prosecution's countervailing purpose possibly be in the present case? To argue that petitioner must die because he is a bad man is hardly worthy of the State of Illinois.

The Illinois Supreme Court has reversed a conviction and death sentence imposed by a jury, despite overwhelming evidence that the defendants had committed the crime charged. *People* v. *Smith, supra.* "A man is not to be convicted of a crime merely because he is a bad man generally or has committed other crimes for which he has not been punished." 108 N.E.2d at 598. Two sawed-off shotguns having nothing whatever to do with the crime charged in the indictment were admitted into evidence.

> Such an array of weapons could only serve to arouse the jury and prejudice the defendant's position. * * * The effect of all this incompetent evidence was to close the mind of the jury to any considera-

> tion of mercy or leniency. * * * A verdict finding him guilty of murder and setting death as his punishment cannot be sustained even if the competent evidence was so complete there could be no other verdict than guilty, where there is any incompetent evidence having a tendency to influence the jury in fixing the degree of punishment.

Petitioner was denied a fair trial and due process of law when the prosecution used the irrelevant sixteen-gauge shotgun to secure his death sentence.

III

THE DECISIONS OF THIS COURT IN WITHERSPOON v. ILLINOIS AND ITS PROGENY REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE.

Witherspoon v. *Illinois*, 391 U.S. 510, unequivocally held that a state may not impose capital punishment where prospective jurors were excused solely on the ground that they expressed conscientious scruples against the death penalty. Subsequent decisions of the Court have consistently reemphasized that

> "it cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' * * * thereby affirms that he could never vote in favor of it or that he could not consider doing so in the case before him.
>
> The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood — or misunderstood — by prospective jurors. * * * Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position."

Witherspoon v. *Illinois*, 391 U.S. at pp. 515-516, n. 9; see also *Boulden* v. *Holman*, 394 U.S. 478, 481-484; *Maxwell* v. *Bishop*, 398 U.S. 262, 264-266. The record of the *voir dire* examination conducted in this case reveals that eight of 48 veniremen were removed for voicing precisely the same general reservations as were expressly condemned in *Witherspoon*.[25]

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[25] Compare 391 U.S. at p. 515 with Tr. 122, 151-152.

ESTHER BYRNE, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. Well, ordinarily enough, I take the same stand as Mr. Byrne. I don't believe in capital punishment.

Q. In other words, even if we have a law in this State to that effect, you wouldn't believe in it, anyway?

A. No, I don't, definitely not.

The Court: Very well. That's your prerogative. You're excused for cause.

LOUIS LORENS, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. I do not believe in capital punishment.

The Court: Well, step down.

(Prospective juror excused.)

KATHERINE KRISTOCK, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. I'm afraid I do. I don't believe in capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

[25] (continued)

MARIAN PETERSON, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction o fthe death penalty in a proper case?

A. Yes, I have very strong convictions against capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

NEBRASKA PETTY, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of a death penalty in a proper case?

A. I do.

The Court: Step down.

(Prospective juror excused.)

JACQUELINE B. THREATT, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. You do? What do you mean?

A. I don't believe in capital punishment.

Q. Say that again.

A. I feel very strongly against capital punishment.

The Court: Step down, please. Call another juror.

[25] (continued)

MARY GORSKI, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do, your Honor.

The Court: All right, step down.

ANNA L. HOHNWALD, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. Step down, please.

This Court has also rejected the justifications offered by the State of Illinois in support of defendant's death sentence. In *Illinois* v. *Speck*, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968), *Illinois* v. *Bernette*, 45 Ill. 2d 227, 258 N.E. 2d 793 (1970), and *Illinois* v. *Tajra*, 45 Ill. 2d 227, 258 N.E. 2d 793 (1970), as in the present controversy, the State Supreme Court improperly attempted to excuse the exclusion of veniremen merely for the expression of scruples against the death penalty on the grounds that the total circumstances and tenor of the *voir dire* examination differed from that condemned by *Witherspoon*, and that any erroneous removal of eligible jurors was rendered harmless by the prosecution's possession of peremptory

challenges. The summary reversal of the death sentence in those, and other cases,[26] calls for like treatment here.[27]

CONCLUSION

For the reasons set forth herein, the conviction of petitioner should be reversed or, at the very least, the death sentence should be set aside.

Respectfully submitted,

ELMER GERTZ
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[26] *Speck* v. *Illinois*, ... U.S. .....; *Bernette* v. *Illinois*, ... U.S. .....; *Tajra* v. *Illinois*, ... U.S. .....; see also *Mathis* v. *Alabama*, ... U.S. .....; *Sequra* v. *Patterson*, ... U.S. .....; *Whan* v. *Texas*, ... U.S. .....; *Dupless* v. *Louisiana*, ... U.S. .....; *Jaggers* v. *Kentucky*, ... U.S. .....; *Aiken* v. *Washington*, ... U.S. .....; *Wheat* v. *Washington*, ... U.S. .....; *Pruett* v. *Ohio*, ... U.S. .....; *Quintana* v. *Texas*, ... U.S. .....; *Wigglesworth* v. *Ohio*, ... U.S. .....; *Crain* v. *Beto*, ... U.S. .....; *Wilson* v. *Florida*, ... U.S. .....; *Pemberton* v. *Ohio*, ... U.S. .....; *Ladetto* v. *Massachusetts*, ... U.S. .....; *Turner* v. *Texas*, ... U.S. .....; *Harris* v. *Texas*, ... U.S. .....; cf. *Adams* v. *Washington*, ... U.S. .....; *Funicello* v. *New Jersey*, ... U.S. .....; *Childs* v. *North Carolina*, ... U.S. .....

[27] In light of this Court's rulings in *Speck* and its companion cases, the State may not argue that the existence of remaining peremptory challenges sufficient to eliminate the eight jurors supports the imposition of the death penalty by a jury otherwise in violation of the Constitution. In any event, the Illinois Supreme Court was factually incorrect since only three peremptory challenges were unused, a number clearly insufficient to remove all improperly excused veniremen.

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IN THE

Supreme Court of the United States

No. 69-5001

LYMAN A. MOORE,

Petitioner,

v.

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

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Constitutional Provisions Involved:

Sixth and Fourteenth Amendments to the United States Constitution 3

IN THE

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Illinois (App. 1a-19a) are reported at 42 Ill. 2d 73, 246 N.E. 2d 299.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on January 29, 1969. A timely petition for rehearing filed on February 19, 1969, was denied on March 25, 1969. The petition for a writ of certiorari was filed on June 23, 1969, supplemented on July 20, 1970,

and granted on June 28, 1971, limited to questions 1, 3 and 4.

Jurisdiction of this Court is conferred by Title 28, U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

1. Petitioner was sentenced to death for murder. Six items of exonerating evidence were not disclosed to him at trial. The court below affirmed on the ground that the prosecution's duty to disclose exonerating evidence depends upon a request; that the prosecutor had shown his entire file to defense counsel at trial and no further request for disclosure was made. None of the exonerating items was contained in said file. Trial defense counsel were ignorant of the existence of the suppressed information.

Questions presented are:

(a) Whether a request is an indispensable prerequisite to disclosure of exonerating evidence by the State?

(b) Whether material evidence favorable to an accused should be disclosed by the State without a request where such evidence is not recorded?

(c) Whether denial of due process of law is contingent upon a request where a State knowingly permits false testimony to remain uncorrected?

(d) Where a prosecutor shows his entire file to defense counsel at trial, but none of the exonerating items of evidence are contained in said file, does that satisfy the prosecution's duty of disclosure?

(e) Whether nondisclosure of the prosecuting police department is imputable to the prosecution?

2. The deceased was killed with a twelve-gauge shotgun. The Chicago Scientific Crime Detection Laboratory determined that he was killed with a twelve-gauge shotgun. (A. 139) The prosecutor stated in a Bill of Particulars that the murder weapon was a twelve-gauge shotgun. (A. 2)

Over objection (A. 81-94), the prosecution introduced a sixteen-gauge shotgun into evidence. (A. 94) The sixteen-gauge shotgun did not belong to the petitioner, was not recovered from him, and was never in his possession or control. (A. 58, 66-71)

During closing argument the prosecutor told the jury that the sixteen-gauge shotgun was not the weapon that killed the deceased, but that any man who was with another man who had the shotgun and shells for it was the type of person that deserved the death penalty. (A. 191-201, 204-206)

The question presented is whether the introduction and use of such evidence, totally unconnected with the petitioner or the crime charged, denied the petitioner a fair trial?

3. Eight veniremen were removed for cause when they voiced general objections to capital punishment or stated that they had religious or conscientious scruples against the death penalty in a proper case.

In the light of *Witherspoon v. Illinois*, 391 U.S. 510, may a state court of review affirm a death sentence,

(a) on the ground that the tenor of *voir dire* examination was unlike that of *Witherspoon*?

(b) on the ground that the prosecution had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon*?

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . have the assistance of counsel for his defense."

Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life . . . without due process of law; . . ."

STATEMENT OF THE CASE

At 10:00 P.M. on April 25, 1962, a bartender in Lansing ejected a profane customer from his tavern. (A. 25-26, 118-119) At 10:55 P.M. that customer returned and shot him in the heart with a twelve-gauge shotgun. (A. 2, 26, 139) Two days later, a man known only as "Slick" bragged that he had shot the bartender in Lansing. (A. 351)

At the trial twenty-five months later, Patricia Hill, a waitress, identified your petitioner as the ejected customer who returned to the tavern and shot the bartender. (A. 25-26) On cross examination defense counsel sought to elicit the circumstances under which she first identified the petitioner, but prosecution objections were sustained on the ground that the questions went "beyond the examination in chief." (A. 28, 31) Henley Powell identified the petitioner as the man who came into the tavern and shot the bartender. Powell had not been in the tavern when the customer was ejected. (A. 32) Similarly, objections to the efforts of the defense to ascertain the circumstances of the initial identification of the petitioner by Henley Powell were sustained. (A. 38)

A prosecution witness named Virgle Sanders identified the petitioner as the man known only as "Slick" who had bragged two days after the murder that he had shot a bartender in Lansing. (A. 44, 47) A written statement that Virgle Sanders had given to the Lansing Police (A. 351) was *not* turned over to defense counsel for use on cross examination. (A. 41-50, 326-327, App. 14a-15a, 17a)

Over objection, a sixteen-gauge shotgun was admitted in evidence (A. 81-94) and used against petitioner. (A. 191-201, 204-206) It was totally unconnected with the petitioner or the crime charged. (A. 58, 66-71)

The defense presented the testimony of one Donald O'Brien who testified that petitioner was *not* the man ejected from Zitek's tavern. (A. 114-116) The head bartender and the general manager of Westmoreland Country Club in Wil-

mette, both testified, and the employment records of the Club showed, the petitioner was employed as a cocktail waiter until after midnight on the night of the murder. (A. 96-97, 99-103, 106-113) Petitioner was paid overtime for that work. (A. 99, 106, App. 13a)

Petitioner was found guilty (A. 218) and was sentenced to death. (A. 220)

At a post-conviction hearing in January, 1967, it was shown that the Lansing Police and/or the prosecution had concealed six items of exonerating evidence from petitioner at trial:

1. Virgle Sanders' written statement to the Lansing Police which showed that he first met the man known as "Slick" on or about November 1, 1961, in Wanda and Del's tavern. (A. 351)

   (Lyman Moore was in a federal penitentiary from February 18, 1957 until March 4, 1962. (A. 354) When confronted at the post-conviction hearing with the fact that petitioner had been incarcerated in a federal penitentiary until March 4, 1962, Sanders admitted that it was *impossible* that petitioner was the man known only as "Slick" who had bragged that he had shot the bartender. (A. 296))

2. The same night that the Lansing Police obtained Virgle Sanders' written statement they raided Wanda and Del's tavern looking for "Slick". Delbert Jones, the owner of Wanda and Del's told them that he knew and could identify "Slick". (A. 254)

   (Six months later when petitioner Lyman Moore was arrested (A. 58), the Lansing Police did *not* contact Delbert Jones for the purpose of having him view petitioner and identify him as the man known only as "Slick". (A. 255))

3. Right after Virgle Sanders supplied the name "Slick", the Lansing Police had an immediate suspect, James E. "Slick" Watts. A photograph of "Slick" Watts was contained in their file. (A. 275) Chief Braschler assigned Lt. Turbin to look for "Slick" Watts. (A. 346)

4. After petitioner Lyman Moore was arrested on October 31, 1962 (A. 58), the Lansing Police photographed him and took said photograph (A. 272, 361) to the home of William Leon Thompson. (A. 251) William Leon Thompson used to patronize Wanda and Del's tavern in the autumn of 1961. He knew the owner of Wanda and Del's, Delbert Jones, and Virgle Sanders, and also knew and could identify the man known only as "Slick". He told Lt. Turbin and Sergeant Vandernoord of the Lansing Police that Lyman Moore did not resemble "Slick". (A. 255, 267, 273, 278)

5. When Virgle Sanders first saw petitioner Lyman Moore at trial some twenty five months after the man known only as "Slick" had bragged that he had shot Bernie Zitek, he said to the Lansing Police officers in the presence of the prosecutors, "The guy that I knew as 'Slick' looked to be about 30 or 40 pounds heavier than this guy." (A. 294) The Lansing Police officers said, "Well, you know how those jailhouse beans are." (A. 295)

6. The Lansing Police file contained a diagram, drawn by a Lansing officer, that would have contradicted the prosecution witness Henley Powell and corroborated the defense witness Donald O'Brien; it showed Henley Powell seated with his back to the entrance through which the assailant entered. (A. 244-245, 260-261, 340-341, 357-358, 360)

On appeal, the majority of the court below affirmed petitioner's conviction and death sentence, but did not mention the unrebutted alibi evidence of two witnesses corroborated by work records; the majority held that the prosecution's duty to disclose exonerating evidence depends upon a request; that the prosecutor had shown his entire file to defense counsel during trial and no further request for disclosure was made (App.7a); that cross examination had not been restricted; that the sixteen-gauge shotgun had been properly admitted in evidence. (App. 4a) *Sua sponte*, it held that *Witherspoon v. Illinois*, 391 U.S. 510, is not controlling at bar. (App. 8a-11a)

On petition for rehearing, petitioner pointed out from the Record that the exonerating evidence was not contained in the prosecutor's file; that trial defense counsel were ignorant of the existence of the suppressed exonerating evidence, and could not reasonably be expected to request something that they did not know existed. (Pet. Reh. pp. 2-18); that the court had ignored his unrebutted alibi evidence (Pet. Reh. p. 18); and that cross examination had been restricted. (Pet. Reh. p. 19) Petitioner attached to his petition for rehearing as an Appendix the *voir dire* examination of twelve prospective jurors, eight of whom had been removed for cause in violation of *Witherspoon* standards. (Pet. Reh. App. 1a-7a)

Mr. Justice Walter V. Schaefer dissented on the grounds: (1) that the State had failed to prove the petitioner guilty beyond a reasonable doubt; (2) that a request is not an indispensable prerequisite to disclosure by the prosecution; that the duty of the prosecution to disclose exonerating evidence cannot be made contingent upon a request when the defense is ignorant of the existence of the suppressed information; that the suppressed exonerating evidence was not shown to be contained in the prosecutor's file; that non-disclosure denied petitioner fundamental fairness; that prejudice to the petitioner was identical whether the evidence was withheld by the prosecution or the police; (3) that the petitioner's right to cross examination had been restricted; (4) that a sixteen-gauge shotgun was improperly admitted in evidence since the prosecution had in its possession throughout the trial ballistic test results that showed that the deceased had been killed with a twelve-gauge shotgun and thus the sixteen-gauge shotgun was unsuitable for the commission of the homicide at bar.

SUMMARY OF ARGUMENT

I

FAILURE OF THE STATE TO DISCLOSE SIX ITEMS OF EXONERATING EVIDENCE TO PETITIONER AT TRIAL DENIED HIM A FAIR TRIAL AND DUE PROCESS OF LAW.

Petitioner was sentenced to death for murder. (A. 220) Six items of exonerating evidence were not disclosed to him at trial. (A. 58, 244-245, 251, 254-255, 260-261, 267, 271, 273, 275, 278, 283, 291, 293-296, 336-337, 340-341, 348, 351, 354, 357-358, 360)

The court below held that none of the items concealed were requested by petitioner during trial, and that:

> "The record discloses that the assistant State's Attorney at the trial showed his entire file to the defense attorney and no further request for disclosure was made." (App. 7a)

However, none of the exonerating items were contained in said prosecutor's file (A. 244-245, 254-255, 266-267, 283, 291, 293-296, 320-324, 346, 366) Trial defense counsel were ignorant of the existence of the suppressed information (A. 306-307, 310-311, 326-329), and could not reasonably be expected to make a request for evidence they did not know existed.

The decision is an open invitation to police and prosecutors to treat a murder case as a sporting event, to hide exonerating evidence from any accused secure in the knowledge that if the accused does not request suppressed information that he does not know exists there is no duty to disclose it.

II

WHERE THE DECEASED WAS KILLED WITH A TWELVE-GAUGE SHOTGUN, THE INTRODUCTION AND USE OF A SIXTEEN-GAUGE SHOTGUN TOTALLY UNCONNECTED WITH PETITIONER OR THE CRIME CHARGED, DENIED PETITIONER A FAIR TRIAL AND DUE PROCESS OF LAW.

The deceased was killed with a twelve-gauge shotgun. (A. 2, 139)

A sixteen-gauge shotgun, totally unconnected with petitioner (A. 58, 66-71), was admitted in evidence over his objection. (A. 81-94)

It is absolutely impossible to fire a twelve-gauge shell in a sixteen-gauge shotgun. "A twelve-gauge shotgun is larger than a sixteen-gauge." (Abst. 80)

The prosecutor used that irrelevant evidence with devastating effect against petitioner. He told the jury that the sixteen-gauge shotgun was not the weapon that killed the bartender. But, he argued that any man who was with another man who had such a weapon and shells for it, was the type of person that deserved the death penalty. (A. 199-201, 204-206)

Since the prosecutor admitted that the sixteen-gauge shotgun was *not* the weapon that killed the bartender (A. 137-138, 200, 202, 204-205), the only reason it was introduced and used against petitioner was to denounce him as a bad man, without regard to his guilt of the crime charged. (A. 199-201, 204-206)

III

THE DEATH SENTENCE IN THE CASE AT BAR CANNOT BE CONSTITUTIONALLY EXECUTED BECAUSE IT WAS IMPOSED BY A JURY FROM WHICH HAD BEEN REMOVED FOR CAUSE THOSE WHO, WITHOUT MORE, WERE OPPOSED TO CAPITAL PUNISHMENT OR HAD CONSCIENTIOUS SCRUPLES AGAINST IMPOSING THE DEATH PENALTY.

Relying heavily on its decision in *People v. Speck*, 41 Ill. 2d 177, the court below makes the gossamer distinction that wholesale removal of prospective jurors for cause proscribed by *Witherspoon* becomes constitutionally permissible if done on a retail basis. (App. 8a-11a) But, we say that the damage is precisely the same no matter how slowly or deliberately the *Witherspoon* doctrine is violated. *Speck v. Illinois*, _____ U.S. _____, June 28, 1971.

The court below also held that the State had sufficient peremptory challenges remaining to have eliminated those prospective jurors eligible to serve under *Witherspoon*. (App. 11a)

The record refutes that holding.

There were 8 veniremen removed for cause in violation of *Witherspoon* standards, and the State had only 4 peremptory challenges remaining, there were at least 4 prospective jurors that the State could not have removed peremptorily.

The holding of the court below is not only factually unsound but legally unsound. Error under *Witherspoon* is not excused simply because the prosecution has sufficient peremptory challenges to remove all such jurors. *In re Anderson*, 73 Cal. Rptr. 21, *Speck v. Illinois*, _____ U.S. _____, June 28, 1971.

ARGUMENT

In a trial for murder the State concealed six items of exonerating evidence and used a weapon that was not connected with the offense or the accused to denounce him as a bad man generally. A jury that had been selected in vio-

lation of *Witherspoon* standards found him guilty and fixed his punishment at death.

I

FAILURE OF THE STATE TO DISCLOSE SIX ITEMS OF EXONERATING EVIDENCE TO PETITIONER AT TRIAL DENIED HIM A FAIR TRIAL AND DUE PROCESS OF LAW.

Petitioner was sentenced to death for murder. (A. 220) Six items of exonerating evidence were not disclosed to him at trial. (A. 58, 244-245, 251, 254-255, 260-261, 267, 271, 273, 275, 278, 283, 291, 293-296, 336-337, 340-341, 348, 351, 354, 357-358, 360)

The court below affirmed petitioner's conviction and death sentence on the ground that none of the items concealed were requested by petitioner during trial, and that:

> "The record discloses that the assistant State's Attorney at the trial showed his entire file to the defense attorney and no further request for disclosure was made." (App. 7a)

However, none of the exonerating items were contained in said prosecutor's file. (A. 244-245, 254-255, 266-267, 283, 291, 293-296, 320-324, 346, 366) Trial defense counsel were ignorant of the existence of the suppressed information (A. 306-307, 310-311, 326-329), and could not reasonably be expected to make a request for evidence they did not know existed.

A. A Request Is Not An Indispensable Prerequisite To Disclosure Of Exonerating Evidence By The State.

Mr. Justice Walter V. Schaefer dissented in the case at bar. On this particular point, he stated:

> "... despite the language in *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194, I do not believe that the Supreme Court intended to establish a request as an indispensable prerequisite

to disclosure by the prosecution. Prior to *Brady* many courts had recognized the duty of the prosecution to disclose favorable, material evidence to the defense. And in many of those cases the defense did not know of the evidence and so had failed to request it. (*Money v. Holohan*, 294 U.S. 103, 79 L. Ed. 791, 55 S.Ct. 340; *Pyle v. Kansas*, 317 U.S. 213, 87 L. Ed. 214, 63 S.Ct. 177; *United States v. Dye*, (3d cir. 1955), 221 F.2d 763; *United States v. Baldi*, (3d cir. 1952), 195 F.2d (815)). In *Brady* the Supreme Court acknowledged the long-standing duty that rested upon the prosecution. In doing so, it used language appropriate to the decision of the case before it. Without an explicit holding to the contrary, I cannot believe that the Supreme Court intended to narrow the duty of the prosecution as it had existed prior to *Brady* by making that duty contingent upon a request when the defense is ignorant of the existence of the suppressed information. Essential fairness, rather than the ability of counsel to ferret out concealed information, underlies the duty to disclose. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 215, 83 S.Ct. 1194; *Barbee v. Warden, Maryland Penitentiary* (4th cir. 1964), 331 F.2d 842; *United States v. Wilkins* (2d cir. 1964), 326 F.2d 135." (App. 17a-18a)

B. Material Evidence Favorable To An Accused Should Be Disclosed Without A Request Where Such Evidence Is Not Recorded.

Four of the six items of exonerating evidence were not even *recorded*. (A. 254-255, 346, 266, 294-295)

Certainly as regards 4 items of unrecorded exculpatory evidence, the defense could not reasonably have been expected to request them. "If the defense does not know of the existence of the evidence, it may not be able to request its production.". (*Giles v. Maryland*, 386 U.S. 66, at page 102, concurring opinion.)

Without exception, the federal courts of appeals that have interpreted *Brady* have held that the duty to disclose favor-

able evidence does not turn upon a request. It seems to us that the underlying policy consideration is the awesome disparity between the State's investigative machinery and that of an individual accused. Therefore, it seems to us that the majority opinion below is legally unsound.

C. Where A Prosecutor Shows His File To Defense Counsel, But None Of The Suppressed Information Is Contained In Said File, That Does Not Satisfy The State's Duty Of Disclosure.

Moreover, we submit that a defense counsel who looks at a prosecutor's file should be able to rely upon the inarticulated representation that everything material or relevant to the case is contained in that file. If exonerating information is not contained in the prosecutor's file, the defense is misled. (Cf. *Jackson v. Wainwright,* 390 F.2d 288, 298).

D. Only By Ignoring The Indisputable Facts Of Record At Bar Could The Majority Hold That There Was No Request.

Not only did Mr. Justice Schaefer dissent on the ground that nondisclosure denied this petitioner the fundamental fairness guaranteed by the constitution, citing *Brady v. Maryland,* 373 U.S. 83 and *United States v. Wilkins,* 326 F.2d 135, but he commented further:

> "The majority, however, disposes of this issue upon the ground that the defendant failed to request the evidence which was suppressed. This ground is neither factually nor legally sound. Prior to the trial the defendant had demanded copies of the grand jury minutes and of all statements made to the Lansing police. The motion was allowed only to the extent of providng the defendant with the statement of each witness who testified at the close of his direct examination. No statement of Virgle Sanders was supplied. Although, as the majority points out, the prosecuting attorney offered his file to the

defense at the trial, that attorney was unable to recall whether the items here involved were in that file. The defendant's attorney testified that none of these items was disclosed to him." (App. 17a)

On Monday, November 18, 1963, six months prior to the trial, the defense filed a formal written motion demanding a copy of the grand jury minutes and any and all written statements in the possession of the Lansing Police taken from complaining witnesses or any other witnesses subsequent to the offense set out in the indictment. (A. 5) What more could defense counsel request? Should he have asked for any and all information that the police and the prosecutors intended to suppress? Must any accused assume that the police and the prosecution will suppress anything not requested? Is the burden upon the accused to assume that the State will ignore Canon 5?

E. The Six Items Of Concealed Evidence Would Have Been Favorable And Material To The Defense.

Six items of exonerating evidence were concealed from the petitioner at the trial. They were brought to light at various times subsequent to the trial, and were formally established in the record at a post-convention hearing on January 11th and 12th, 1967.

Five of the items of exonerating evidence directly and indirectly concern the prosecution witness Virgle Sanders. Virgle Sanders testified at the trial that the petitioner Lyman Moore was the man that he knew only as "Slick"; that on April 27, 1962, at 2:30 P.M., he saw him in the Ponderosa Tap in Dolton (A. 41-42) at which time he said, "Hey Virgle, it's open season on bartenders. I shot one in Lansing Wednesday night". (A. 44, 47)

The five items are as follows:

(1) On April 30, 1962, at 8:50 P.M., Virgle Sanders gave a written statement to the Lansing Police in which he stated that he had first met "Slick" "about six months ago." (A. 351)

(The significance of that statement is that petitioner Lyman Moore was in federal prison at that time. The Lansing Police received an F.B.I. report in November, 1962 (A. 241), that showed Lyman Moore in a federal penitentiary from February 18, 1957, until March 4, 1962. (A. 354)

Petitioner's written pretrial demand for a copy of all statements made to the Lansing Police (A. 4-9) was denied on the representation of the prosecutor that all statements of prosecution witnesses would be supplied to the defense after the direct examination of each. (A. 7-9)

Copies of written statements to the Lansing Police of prosecution witnesses Hill and Powell were supplied to the defense at the close of their direct examinations. (A. 28, 33) But, Virgle Sander's written statement was *not* supplied to the defense for cross examination (A. 47-50, 326-327, App. 12), in spite of the *trial* prosecutor's representation that it would be supplied. (A. 7-9)

At the post-conviction hearing on January 11, 1967, Virgle Sanders testified definitely that he saw the man that he knew as "Slick" in Wanda and Del's tavern before Christmas of 1961. (A. 295) When confronted with the fact that the petitioner Lyman Moore had been incarcerated in a federal penitentiary until March 4, 1962, he admitted that it was *impossible* for Lyman Moore to be the man that he knew as "Slick" who two days after the murder had bragged that he had shot the bartender in Lansing. (A. 296; App. 15a))

(2) On April 30, 1962, shortly after Virgle Sanders had given his written statement to the Lansing Police, the Lansing Police raided Wanda and Del's tavern in Chicago, looking for "Slick". The owner-bartender, Delbert Jones, told them that he knew and could identify the man known as "Slick". (A. 254)

(Six months later, when the petitioner Lyman Moore was arrested (A. 78), the Lansing Police did

not contact Delbert Jones for the purpose of having him view the petitioner to identify him as the man known as "Slick". (A. 255, 336-337)

At the post-conviction hearing, Delbert Jones identified a photograph of James E. Watts (A. 274, 362) as the man known as "Slick" that used to come into his tavern in the autumn or fall of 1961. (A. 332, 334-335) He also testified that he was shown a photograph of Lyman Moore and said he was not "Slick". (A. 333) He saw Lyman Moore in person in the Cook County Jail on December 23, 1964, and said that he was not "Slick". (A. 337)

A prosectuion objection on the ground that defense counsel was not permitted to prove the petitioner innocent in a post-conviction hearing was sustained (A. 337), and Delbert Jones' testimony was stricken en toto. (A. 338))

(3) May 1, 1962, or shortly thereafter, the Lansing Police had an immediate suspect, James E. "Slick" Watts. They had a photograph of "Slick" Watts in their file on the Zitek murder case. (A. 275) Chief Braschler assigned Lt. Turbin to look for "Slick" Watts. (A. 346)

(The photograph was discovered after the post-conviction petition was filed. (A. 335) The fact that Chief Braschler considered James E. "Slick" Watts such a good suspect that he assigned Lt. Turbin to "look for" him was not brought to light until January 12, 1967, when Chief Braschler testified in the post-conviction hearing. (A. 346))

(4) On November 1 or 2, 1962, the Lansing Police took a photograph of the petitioner Lyman Moore to the home of William Leon Thompson. (A. 251, 272, 361) William Leon Thompson used to patronize Wanda and Del's tavern in the autumn of 1961. He knew Delbert Jones, the owner of Wanda and Del's, and he knew Virgle Sanders. He also knew and could identify the patron of Wanda and Del's who was known only by his nickname "Slick". He told Lt. Turbin and Sergeant Vandernoord of the Lansing Police that

Lyman Moore did not resemble "Slick". (A. 255, 267, 273, 278)

(This visit to Thompson's home and his statement that Lyman Moore did not resemble "Slick" was not disclosed to the defense at trial; it was not even recorded. (A. 266)

The Lansing Police had spoken to Thompson in the Ponderose tavern three days after the homicide, at which time he told them that he had heard about the bragging incident by "Slick" on the previous afternoon. (A. 265, 281-284) And the Lansing Police knew that Virgle Sanders, Delbert Jones, and William Leon Thompson all knew each other and that each knew "Slick". (A. 254, 283, 291, 293, 336)

Delbert Jones, the owner of Wanda and Del's tavern, was never brought in to view Lyman Moore by the Lansing Police, nor was he shown the photograph of him that was shown to Thompson. (A. 336-337, 348)

[Long after the trial, when Delbert Jones was shown the same photograph of Lyman Moore by defense counsel, and when he viewed Lyman Moore in person in the County Jail on December 23, 1964, he said that Lyman Moore was not "Slick". (A. 333, 337)]

Virgle Sanders was not permitted to look at Lyman Moore until May 13, 1964, over two years later, when he was brought to court to testify at the trial. (A. 294))

(5) On May 13, 1964, when Virgle Sanders was brought to court to testify at the trial, when he first saw Lyman Moore he said to Lt. Turbin and other Lansing police officers, in the presence of the prosecutors; "The guy that I knew as 'Slick' looked to be about 30 or 40 pounds heavier than this guy." (A. 294). The Lansing police officers said, "Well, you know how those jailhouse beans are." (A. 295)

(The fact of actively encouraging Virgle Sanders to falsely identify the petitioner as "Slick" was never recorded in any file. It was not revealed to

the defense at trial; it first came to light on June 12, 1965 (A. 291), and it was formally established in the record on January 11, 1967, at the post-conviction hearing. (A. 294-295))

The sixth item of exonerating evidence concerned the prosecution witness Henley Powell, who testified that he was playing pinochle with Donald O'Brien and two other men in Zitek's tavern at the time of the shooting; that he saw the shooting because he was seated facing the bartender with a view of the entrance. (A. 32, 34)

Donald O'Brien, a defense witness, testified that Henley Powell was seated with his back to the entrance, looking towards the other end of the tavern. (A. 120)

(6) The Lansing Police file contained a diagram, drawn by a Lansing police officer, which diagram contradicts the prosecution witness Henley Powell and corroborates the defense witness Donald O'Brien; it shows Henley Powell seated with his back to the entrance through which the assailant entered. (A. 244-245, 260-261, 340-341, 357-358, 360)

(At the post-conviction hearing the prosecutor did not recall ever having seen said diagram. (A. 327) Both defense counsel testified that said diagram was not supplied to them at the trial. (A. 307, 328)

The diagram first came to light some time subsequent to April 29, 1966 (A. 239) and was admitted in evidence at the post-conviction hearing on January 11, 1967. (A. 244-245) It shows that Henley Powell was seated with his back to the entrance through which the assailant entered. (A. 357-358, 360))

F. Nondisclosure Of Material Evidence Favorable To The Accused By The Prosecuting Police Department Is Imputable To The Prosecution.

The court below seemed to recognize that much of the exonerating evidence was concealed by the Lansing Police not only from the petitioner but also from the prosecutors:

> "... it does not appear that any error in the testimony was known to the prosecution." (App. 8a)

However, we submit that the correct view regarding the denial of this petitioner's federal constitutional rights is expressed by Mr. Justice Schaefer in his dissenting opinion:

> "... the prejudice to the defendant is identical whether the evidence is withheld by the prosecutor or by the police." (App. 18a, citing *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842)

G. Where A State Knowingly Permits False Testimony To Remain Uncorrected, That Is A Denial Of Due Process Of Law Regardless Of Whether There Was Any Prior Request.

On appeal petitioner argued that the State had suffered false testimony to remain uncorrected. The court below recognized the fact that Powell was mistaken as to which direction he was facing at the time of the homicide but held, "Such contradictions in testimony go to the weight of the evidence and do not in any way indicate perjury." (App. 8a)

The fallacy to that kind of reasoning is that after twenty-five months Henley Powell might have honestly believed what he testified to, but the Lansing Police knew better because of the diagram in their file that showed he was mistaken or lying. And the jury had no opportunity to *weigh* the diagram that contradicted Powell and corroborated O'Brien. See, *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842.

The court below missed the thrust of *Alcorta v. Texas*, 355 U.S. 28, *Napue v. Illinois*, 360 U.S. 264, and *Miller v. Pate*, 386 U.S. 1, when it held:

> "Sanders testified that the defendant was the man he knew as 'Slick'. Even though it appears that he said he had met Slick at a time that Moore was in fact in prison, and that other people did not know Moore as 'Slick', and the fact that Sanders had first stated that the man he knew as 'Slick' was about 30 or 40 pounds heavier than Moore does not indicate perjury, but mere testimonial inconsistency." (App. 8a)

The jury that sat in judgment of this petitioner was not permitted to hear one word of the "mere testimonial inconsistency" because the police *and* the prosecutors who had concealed it from the jury did *not* bring it to the attention of the jury.

The test to be applied in such cases is whether the testimony may have had an effect on the outcome of the trial. Even the dissenting opinion in *Giles v. Maryland*, 386 U.S. 66, at page 116, agrees that that is the standard:

> "The Court has held since *Mooney v. Holohan*, 294 U.S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406, that a State's knowing use of perjured testimony denies a fair trial to the accused. Mooney has been understood to include cases in which a State knowingly permits false testimony to remain uncorrected. *Alcorta v. Texas*, 355 U.S. 28, 2 L.ed. 2d 9, 78 S. Ct. 1173. The standard applied in such cases has been whether the testimony 'may have had an effect on the outcome of the trial.' *Napue v. Illinois*, supra, 360 U.S. at 272, 3 L.ed. 2d at 1223. These cases were very recently followed and applied in *Miller v. Pate*, 386 U.S. 1, 17 L.ed. 2d 690, 87 S.Ct. 785."

H. What Kind Of A Trial Would The Jury Have Heard If All Of The Undisclosed Evidence Had Been Presented?

Patricia Hill would have made her in-court identification of the defendant as the man who was ejected from Zitek's Tavern at 10:00 P.M. and who returned at 10:55 P.M. and shot Bernie Zitek in the heart with a shotgun. (A. 25-26)

Henley Powell would have made an in-court identification of the defendant as the assailant. (A. 32-33) But, evidence would have been introduced in the form of a diagram drawn by a Lansing police officer on the night of the homicide to show that he was sitting with his back to the entrance, indicating that he could not have seen the killing. (A. 260-261, 340-341)

Virgle Sanders would have testified as he did that he knew the defendant sitting in Court; that he knew him only by the nickname "Slick"; that he saw him in the Ponderosa Tap in Dolton on April 27, 1962, at 2:30 or 3:00 P.M. (A. 41-42); that the defendant said, "It's open season on bartenders. I shot a bartender in Lansing." (A. 47)

On cross examination it would have been shown that the first time that Sanders was asked to view the defendant was that day in court; that when he first saw him he said that the guy he knew as Slick looked to be about 30 or 40 pounds heavier than the defendant; that the Lansing police said, "Well, you know how those jailhouse beans are." (A. 295) It would have been established that Delbert Jones, the owner of Wanda and Del's tavern, knew Sanders and "Slick" and also William Leon Thompson. The witness would have been asked to verify the fact that he first met "Slick" in Wanda and Del's before Christmas of 1961. (A. 295) He would have been shown the F.B.I. report indicating that Lyman Moore was in federal prison in Leavenworth, until March 4, 1962, and he would have replied as he did in the post-conviction hearing, "If he's in jail, it would have been impossible to be the same man." (A. 296)

Chief Braschler would have been called to testify that the Lansing police had an immediate suspect by the name of Slick Watts, James E. "Slick" Watts; that he had assigned Lt. Turbin to "look for" Slick Watts. (A. 346)

Delbert Jones would have been called to testify that he knew a man called "Slick" that used to frequent his tavern Wanda and Del's; that the defendant in court was not the man called "Slick". (A. 337) He would have been shown a photograph of James E. Watts and would have testified that Watts was the man called "Slick". (A. 334)

William Leon Thompson would have been called to testify that he knew Virgle Sanders (A. 271), Delbert Jones, the owner of Wanda and Del's tavern, and a man called "Slick" that used to frequent that tavern. He would have been asked to look at the defendant in court, and he would have testified that the defendant was not the man that he knew as "Slick". (A. 273) He would have been shown a photograph of James E. Watts, and he would have testified that Watts was the man he knew as "Slick". (A. 274, 275, 276, 277)

Then, Donald O'Brien would have been called to testify as he did that he heard the shot but did not see the assailant; but that the defendant was definitely not the man that Bernie Zitek had ejected at 10:00 P.M. (A. 117)

In addition to all that of course there would be presented the testimony of two disinterested respectable alibi witnesses who would have testified as they did that the defendant was at work over fifty miles away at the time of the crime. (A. 96, 106) The alibi was corroborated by work records. (A. 99, 106, 109, 113)

Had the jury heard all the evidence, including the evidence that was not disclosed, it may have found the petitioner not guilty.

Mr. Justice Schaefer concluded from the trial record alone, even without the exculpatory evidence that was not disclosed, that the State had failed to prove the petitioner guilty beyond a reasonable doubt. (App. 13a-14a)

WHERE THE DECEASED WAS KILLED WITH A TWELVE-GAUGE SHOTGUN, THE INTRODUCTION AND USE OF A SIXTEEN-GAUGE SHOTGUN TOTALLY UNCONNECTED WITH PETITIONER OR THE CRIME CHARGED, DENIED PETITIONER A FAIR TRIAL AND DUE PROCESS OF LAW.

The deceased was killed with a twelve-gauge shotgun. (A. 2, 139)

A sixteen-gauge shotgun, totally unconnected with petitioner (A. 58, 66-71), was admitted in evidence over his objection. (A. 81-94)

The prosecutor used that irrelevant evidence with devastating effect against petitioner. He told the jury that the sixteen-gauge shotgun was not the weapon that killed the bartender. But, he argued that any man who was with another man who had such a weapon and shells for it, was the type of person that deserved the death penalty. (A. 199-201, 204-206)

The majority of the court below held:

> "There is no clear evidence of the weapon actually used in this homicide, although it is clear that it was a shotgun. We have consistently held that a weapon found upon a defendant suitable for the commission of a crime charged is proper evidence even though there is no showing that it was the actual weapon used. (Citing cases.)" (App. 4a)

Mr. Justice Schaefer dissented on the ground that in the cases cited by the majority no ballistic evidence was available, and therefore the suitability of the weapon could be established only by physical description, but that in the case at bar the prosecution had ballistic test results which showed that the bartender was shot with a twelve-gauge shotgun; that the sixteen-gauge shotgun was unsuitable for the commission of the murder. (App. 14a) And, of course, Mr. Justice Schaefer is right. One could not get a twelve-gauge shotgun shell into a sixteen-gauge shotgun with a hydraulic press! A twelve-gauge shotgun is larger than a sixteen gauge. (A. 80)

The dissenting opinion also pointed out that the sixteen-gauge shotgun was never in the possession or control of the petitioner. (App. 14a) The record verifies that observation. It did not belong to the petitioner and was not recovered from him. It was recovered from a 1957 Ford automobile (A. 58, 66-71) owned by a man named Barbee. (A. 68) The sawed-off barrel was recovered from Barbee's home. (A. 77)

Since the prosecutor admitted that the sixteen-gauge shotgun was *not* the weapon that killed the bartender (A. 137-138, 200, 202, 204-205), the only reason it was introduced and used against petitioner was to denounce him as a bad man, without regard to his guilt of the crime charged. (A. 199-201, 204-206)

This seems to be a case of first impression. We can find no case in which a weapon totally unconnected with the accused or the crime charged has been held admissible in evidence. The closest analogy that we can find is in cases involving prior convictions.

"While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trial in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." (*Spencer v. Texas*, 385 U.S. 554, at 572-575, dissenting opinion, and cases cited therein.)

The case at bar presents an *a fortiori* situation. As the majority opinion in *Spencer v. Texas* points out, "under recidivist statutes, the jury learns of prior crimes committed by the defendant, but the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence. The defendant's interests are protected by limiting instructions. . . ." (385 U.S. 554, at 561).

In the case at bar, there were no limiting instructions. Indeed, there could not have been any. Either the sixteen-gauge shotgun was relevant to the question of guilt or innocence of the crime charged, or it wasn't. The dissenting opinion holds, and the record shows, that it was not.

It is pure sophistry to hold that there is no clear evidence of *the weapon* actually used in this homicide (App. 4a) when the prosecutor admitted that the sixteen-gauge shotgun was *not* the weapon used to kill the deceased. (A. 137-138, 200, 202, 204-205)

It *was* used in an attempt to kill the petitioner.

Here are a few excerpts from the prosecutor's closing argument that demonstrate how he used the sixteen-gauge shotgun to obtain a death penalty verdict from the jury:

> Mr. Fleming: Now, he stated to you about the most important witness in this case is this shotgun. And he said this shotgun was found again in a car that was not owned by this defendant. But it was a car that this defendant—and again this man with the mustache were arrested getting in the automobile.
>
> They say this is a 16, which it is, it is a 16. And we stipulated that the pellets, if the expert would have testified that in his opinion they would have been from a twelve-gauge shotgun. He said because this is a 16 and because the pellets came from a twelve-gauge shotgun, really this is the most important thing in this case.
>
> We never contended and we don't now, and the evidence doesn't show it, that this is the shotgun that killed Bernard Zitek. He said, well, this is the thing and the reason why you should go back and find this man not guilty.
>
> Lyman Moore, I submit to you, is that type of defendant that knows when he shoots a bartender and kills that bartender, about the only way for him to get out of it is to toss the shotgun he shot the bartender with in a creek, bury it, burn it or something else, because he knows if he ever gets caught with that shotgun he is absolutely a goner.

This is not the shotgun that killed Bernard Zitek, there is no question about it. But one thing we know from this shotgun being in that car—let me have those pellets—that the man with the mustache again and Lyman Moore are those kind of people that use shotguns.

And take a look at those, folks, these are in evidence so you can look at them. You see this shell here, it has a ballbearing at the end of it. I wonder what they were going hunting for with this. Pheasants? You shoot deer with this in Wisconsin and Michigan. The other three are goose shot, number 4's. You shoot geese in Canada with that, you don't hunt pheasants in Illinois or target practice with these things, you kill things with this. There is a ballbearing at the end of this, and that is what was in this weapon when it was found in the car as Lyman Moore and this other man went to get into it. (A. 199-201)

* * * * *

Is it the type of case where the person has a fight, —and when I say a fight, he uses abusive language at a bartender and the bartender, because he uses this abusive language, tells him he is going to get kicked out, is it reason enough for a man to come back with that shotgun or one like it, it wasn't this one it was one like it, and kill that person?

Is it reason enough to come back an hour later with the shotgun, a loaded shotgun, and kill that person? These are the things you take into consideration.

The next thing you take into consideration is when Moore came back at 11:00 o'clock, walked into the bar with a shotgun, they said it was a single barrel shotgun, cold-bloodedly placed the shotgun on the bar, aimed it at the bartender, pulled the trigger and left. That is what he did.

Is this the type of case that deserves a recommendation of the death penalty? Take into consideration this, and this is in evidence. This is a shotgun, this

is a sixteen-gauge shotgun. A twelve-gauge shotgun killed Bernie Zitek. Is the shotgun the most humane type weapon that if someone were to kill another person or shoot them, is this the type of weapon that you would say well, he didn't have the right to kill him but at least it was a clean death.

You heard Doctor Wagner testify. He testified that this—when I say "this" I am not referring to this specifically but a shot gun shell entered his right chest and all the beebees went all over and his heart exploded and that's why he died. Is this the way people should die? Is this the kind of case that deserves the death penalty? (A. 204-205)

* * * * *

Is the death penalty the type of penalty that is appropriate for shotguns loaded with ballbearings? Is the death penalty appropriate in this type of case where a weapon such as this, not a pistol, not a revolver, an automatic or a rifle, not a club was used but a hard, cold shotgun that shoots a slug about the size of this. Is this the type of case?" (A. 206)

If one accepts the prosecutor's theory of guilt by association, the most that can be said for the sixteen-gauge shotgun is that it is evidence of general criminal disposition of someone else. Yet, it pervaded the entire trial from the opening statement (A. 16), during presentation of evidence (A. 57-59), and the major portion of the closing argument as we have shown. Since it was not connected with the offense or the accused, it cannot even qualify as propensity evidence. And the courts have consistently held that type of evidence inadmissible. (*Spencer v. Texas*, 385 U.S. 554, at 572-575, dissenting opinion, and cases cited therein.)

III

THE DEATH SENTENCE IN THE CASE AT BAR CANNOT BE CONSTITUTIONALLY EXECUTED BECAUSE IT WAS IMPOSED BY A JURY FROM WHICH HAD BEEN REMOVED FOR CAUSE THOSE WHO, WITHOUT MORE, WERE OPPOSED TO CAPITAL PUNISHMENT OR HAD CONSCIENTIOUS SCRUPLES AGAINST IMPOSING THE DEATH PENALTY.

The court below held:

> "On *voir dire* in this case each juror was asked in substance: Do you have any religious or conscientious scruples against the infliction of the death penalty in the proper case? Twelve jurors positively asserted that they had such scruples and were excused for cause without motion by the State or objection by the defendant.
>
> The tenor of the entire examination, however, was unlike *Witherspoon* where the trial court promptly removed all who expressed the slightest qualms about capital punishment." (App. 8a-9a)

Relying heavily on its decision in *People v. Speck*, 41 Ill. 2d 177, the court below makes the gossamer distinction that wholesale removal of prospective jurors for cause proscribed by *Witherspoon* becomes constitutionally permissible if done on a retail basis. (App. 8a-11a) But, we say that the damage is precisely the same no matter how slowly or deliberately the *Witherspoon* doctrine is violated. *Speck v. Illinois*, _____ U.S. _____, June 28, 1971.

Clearly, emphatically, and categorically, your Honors said in *Witherspoon*:

> "Specifically, we hold that a death sentence cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v. Illinoi*, 391 U.S. 510, 522)

That language was plain enough for the California Supreme Court to hold that reversal of a death sentence is automatically required if a single venireman was improperly excused for cause on the basis of his opposition to the death penalty. *In re Anderson*, 73 Cal. Rptr. 21 (11-18-68).

On April 2, 1969, this Court made it crystal clear that it meant just what it said in the *Witherspoon* case. *Boulden v. Holman*, 394 U.S. 478. In a 7 to 1 decision, the case was remanded to the District Court for hearing, citing footnotes 9 and 21 of *Witherspoon*.

And on June 28, 1971, this Court held in *Speck v. Illinois*, ____ U.S. ____, that the death penalty had to be set aside under *Witherspoon*.

The court below also held that the State had sufficient peremptory challenges remaining to have eliminated those prospective jurors eligible to serve under *Witherspoon*. (App. 11a)

The record refutes that holding.

Each side had 20 peremptory challenges under the statute. (Ill. Rev. Stat. 1963, chap. 38, par. 115-4(e)) The prosecution had exercised 16 peremptory challenges. (Trial Record, pp. 146, 162, 242, 242, 242, 269, 277, 281, 303, 322, 322, 329, 329, 342, 346, 350). There were 8 prospective jurors removed for cause clearly in violation of *Witherspoon* standards:

Excerpts From The Record
On
Voir Dire Examination

Page of Record

118 ESTHER BYRNE, prospective juror:

122 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. Well, ordinarily enough, I take the same stand as Mr. Bryne. I don't believe in capital punishment.

Q. In other words, even if we have a law in this State to that effect, you wouldn't believe in it, anyway?

A. No, I don't, definitely not.

The Court: Very well. That's your prerogative. You're excused for cause.

LOUIS LORENS, prospective juror:

151 Q. Do you know of any reason why you cannot
152 be a fair and impartial juror in this case?

A. I do not believe in capital punishment.

The Court: Well, step down.

(Prospective juror excused.)

210 KATHERINE KRISTOCK, prospective juror:

212 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. I'm afraid I do. I don't believe in capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

248 MARIAN PETERSON, prospective juror:

250 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I have very strong convictions against capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

NEBRASKA PETTY, prospective juror:

252 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of a death penalty in a proper case?

A. I do.

The Court: Step down.

(Prospective juror excused.)

308 JACQUELINE B. THREATT, prospective juror:

309 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. You do? What do you mean?

A. I don't believe in capital punishment.

Q. Say that again.

A. I feel very strongly against capital punishment.

The Court: Step down, please. Call another juror.

350 MARY GORSKI, prospective juror:

352 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do, your Honor.

The Court: All right, step down.

365 ANNA L. HOHNWALD, prospective juror:

366 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. Step down, please.

Since there were 8 veniremen removed for cause in violation of *Witherspoon* standards, and the State had only 4 peremptory challenges remaining, there were at least 4 prospective jurors that the State could not have removed peremptorily.

The holding of the court below is not only factually unsound but legally unsound. Error under *Witherspoon* is not excused simply because the prosectuion has sufficient peremptory challenges to remove all such jurors. *In re Anderson*, 73 Cal. Rptr. 21; *Speck v. Illinois*, _____ U.S. _____, June 28, 1971.

The death penalty should be vacated.

CONCLUSION

Petitioner prays that the judgment of the court below be reversed.

Respectfully submitted,

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August 11, 1971

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IN THE

Supreme Court of the United States

October Term, 1971
No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Motion for Leave to File Brief Amici Curiae and Statement of Interest of the Amici.

and

Brief of N.A.A.C.P. Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Motion for Leave to File Brief Amici Curiae and Statement of Interest of the Amici.

Movants N.A.A.C.P. Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent respectfully move the Court for permission to file the attached brief *amici curiae,* for the following reasons. The reasons assigned also disclose the interest of the *amici.*

(1) Movant N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty to employ legal counsel on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Le-

gal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in matters resulting in decisions that have had a profoundly reformative effect upon the administration of criminal justice.

(2) A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes. In order more effectively to achieve this purpose, the LDF in 1965 established as a separate corporation movant National Office for the Rights of the Indigent (NORI). This organization, whose income is provided initially by a grant from the Ford Foundation, has among its objectives the provision of legal representation to the poor in individual cases and the presentation to appellate courts of arguments for changes and developments in legal doctrine which unjustly affect the poor.

(3) LDF attorneys have handled many capital cases over the years, particularly matters involving Negro defendants charged with capital offenses in the Southern States. This experience has led us to the view, confirmed by the studies of scholars[1] and more recently

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[1] *E.g.*, President's Commission on Law Enforcement and Administration of Justice, Report, *The Challenge of Crime in a Free Society* 143 (1967); United Nations, Department of Economic and Social Affairs, Capital Punishment—Developments 1961-1965 (ST/SOA/SD/10) 20 (1967); Weihofen, the Urge to Punish 164-65 (1956); Hartung, *Trends in the Use of Capital Punishment*, 284 Annals 8, 14-17 (1952); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. Crim. L., Crim & Pol. Sci. 301 (1962).

by empirical research undertaken under LDF auspices,[2] that the death penalty is administered in the United States in a fashion that makes racial minorities, the deprived and downtrodden, the peculiar objects of capital charges, capital convictions, and sentences of death. Our experience has convinced us that this and other injustices are referable in part to certain common practices in capital trial procedure, which depart alike from the standards of an enlightened administration of criminal justice and from the minimum requirements of fundamental fairness fixed by the Constitution of the United States for proceedings by which human life may be taken. Finally, we have come to appreciate that in the uniquely stressful and often contradictory litigation pressures of capital trials and direct appeals, ordinarily handled by counsel appointed for indigent defendants, many circumstances and conflicts may impede the presentation of attacks on these unfair and unconstitutional practices; and that in the post-appeal period, such attacks are grievously handicapped by the ubiquitous circumstances that the inmates of the death rows of this Nation are as a class impecunious, mentally deficient, unrepresented and therefore legally helpless in

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[2]A study of the effect of racial factors upon capital sentencing for rape in the Southern States (which virtually alone retain the death penalty for that crime) was undertaken in 1965, with LDF financial support, by Dr. Marvin E. Wolfgang and Professor Anthony G. Amsterdam. The nature of the study is described in the memorandum appended to the report of *Moorer v. South Carolina*, 368 F.2d. 458 (4th Cir. 1966), and in *Matter of Sims and Abrams*, 5th Cir. Nos. 24271-2, decided August 10, 1967. Its results, so far analyzed, show persuasively that the death penalty is discriminatorily applied against Negroes at least in rape cases. One aspect of these results, limited to the State of Arkansas, was presented in the record in *Maxwell v. Bishop*, 385 U.S. 650 (1967).

the face of death.[3] Common state practice makes no provision for the furnishing of legal counsel to these men.

(4) For these reasons, *amici* LDF and NORI have undertaken a major campaign of litigation attacking on federal, constitutional grounds several of the most vicious common practices in the administration of capital criminal procedure, and assailing the death penalty itself as a cruel and unusual punishment. The status of that litigation is described more fully elsewhere. Suffice it to say here that we represent or are assisting attorneys who represent, more than half of the 400 men on death row in the United States; and the lives of virtually all of these men will be affected by the Court's decision in this and the other cases now before the Court on the death penalty.

(5) Counsel for the petitioner in *Moore* has consented to the filing of a brief *amici curiae* by the

[3]Recently, in connection with *Adderly v. Wainwright*, 272 F. Supp. 530 (M.D. Fla. 1967) LDF lawyers were authorize by court order to interview all of the condemned men on death row in Florida. The findings of these court-ordered interviews, subsequently reported by counsel to the court, indicated that of 34 men interviewed whose direct appeals had been concluded, 17 were without legal representation (except for purposes of the *Adderly* suit itself, a class action having as one of its purposes of declare their constitutional right to appointment of counsel); 11 others were represented by volunteer lawyers associated with the LDF or ACLU; and in the case of 2 more, the status of legal representation was unascertained. All 34 men (and all other men interviewed on the row) were indigent) the mean intelligence level for the death row population (even as measured by a nonverbal test which substantially overrated mental ability in matters requiring literacy, such as the institution or maintenance of legal proceedings) were below normal; unrepresented men were more mentally retarded than the few who were represented; most of the condemned men were, by occupation, unskilled, farm or industrial labors; and the mean number of years of schooling for the group was a little over eight years (which does not necessarily indicate eight grades completed).

N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as has counsel for the respondent State of Illinois.

Wherefore, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971
No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Brief of N.A.A.C.P. Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent.

Statement of Facts.

Petitioner was found guilty of murder before the Circuit Court, Cook County, State of Illinois, and sentenced to death. The conviction and sentence were upheld by the Supreme Court of Illinois in *People v. Moore*, 42 Ill.2d 73, 246 N.E.2d 299 (1969). A petition for a writ of certiorari was filed with the Court on June 23, 1969, supplemented on July 20, 1970, and granted on June 28, 1971. There are three questions before the Court, only one of which is discussed in this brief, namely, eight veniremen were removed for cause when they voiced general objections to capital punishment or stated that they had religious or conscientious scruples against the death penalty in a proper case; in the light of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), may a state court of review affirm a death sentence,

(a) on the ground that the tenor of *voir dire* examination was unlike that of *Witherspoon?*

(b) on the ground that the prosecution had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon?*

Summary of Argument.

We urge the Court to reverse the imposition of the death sentence in this case on the grounds that the jury selection process resulted in the unconstitutional exclusion of veniremen who voiced general objections to the death penalty. The exclusion of these veniremen was contrary to the Court's decision in *Witherspoon v. Illinois,* 391 U.S. 510 (1968). We further urge the Court to amplify its *Witherspoon* decision to end, once and for all, continued efforts by some lower courts to improperly avoid the impact of *Witherspoon* by focusing on irrelevant distinctions such as those drawn by the court below in this case.

ARGUMENT.

I.

The Death Penalty Cannot Be Carried Out in This Case Because Veniremen Who Voiced Mere General Objections to the Death Penalty Were Removed From the Jury Which Imposed the Sentence.

In the case before the Court, twelve veniremen were removed from the jury panel because of reservations they had concerning imposition of the death penalty. An excerpt from the *voir dire* covering the questioning of each of the excluded veniremen is set forth in the Appendix attached hereto. The only relevent question is whether any of these veniremen were removed contrary to the standards set forth in *Witherspoon*.

In *Witherspoon* this Court held that:

> "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois, supra* at 522.

A narrow reading of *Witherspoon* makes it clear that any test used to determine whether a venireman has been properly excluded from a capital case must *at least* be consistent with the Court's statement that its decision had no bearing on a State's power to exclude veniremen who make it

> ". . . unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the

> death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Witherspoon v. Illinois, supra* at 522-23 n. 21.

Thus, at a minimum, *Witherspoon* says that a venireman may not be excluded for cause because of his views on the death penalty unless: (1) his views are unmistakably clear, *and* (2) his views would automatically compel him to vote against imposition of the death penalty *or* would prevent him from making the required impartial determination of guilt or innocence.

It is also clear that *Witherspoon* will countenance no exclusions made on any broader basis than that stated by the Court in footnote 21. Before stating its minimum requirements for exclusion, the Court cautioned in the very same footnote that:

> "[i]f the *voir dire* testimony in a given case indicates that veniremen were excluded on *any broader basis* than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevent jurisdiction would appear to support only a narrower ground of exclusion." (Emphasis added.)

Lastly, it is clear that in deciding whether a venireman has been properly excluded, any ambiguity which casts doubt upon whether he has made his views unmistakably clear must be resolved against exclusion. Judge Simpson, writing for a unanimous court reversing for violation of *Witherspoon* in *Marion v. Beto*, 434 F. 2d 29, 31 (5th Cir. 1970), noted:

> "The Supreme Court further implied that doubts concerning the ability of a venireman to subordi-

nate his personal views to his oath as a juror to obey the law of the state should be resolved against exclusion, stating in footnote 9, on page 515-516 of the opinion, 88 S. Ct. on page 1774:

> "'Unless a venireman states *unambiguously* that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that this is his position.' (Emphasis added.) [Footnote omitted.]"

It is clear that each of the excluded veniremen were removed from the jury in this case *solely* because they voiced "general objections to the death penalty or expressed conscientious or religious scruples against its inflictions". Veniremen Byrne, Lorens, Kristock, Petty, Threatt, Gorski and Hohnwald were excluded merely because they said that they did not believe in capital punishment or that they had religious or conscientious scruples against infliction of the death penalty in a proper case. In *Witherspoon*, this Court specifically considered "proper case" exclusions and declared:

> "[I]t cannot be assumed that a juror who described himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' [Citations] thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him.' [Citations] Obviously many jurors 'could, notwithstanding their conscientious scruples [against capital punishment], return . . . [a] verdict [of death] and . . . make

their scruples subservient to their duty as jurors.' [Citations] Yet such jurors have frequently been deemed unfit to serve in a capital case. [Citation] "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors. Any 'layman . . . [might] say he has scruples if he is somewhat unhappy about death sentences . . . [Thus] a general question as to the presence of . . . reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases.' Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that this is his position." *Witherspoon v. Illinois*, *supra* at 515-16 n. 9.

The inherent ambiguity in almost any question that asks whether a venireman could return the death penalty in a "proper case" is that the venireman might easily assume that the law classifies certain kinds of cases as "proper." The only way that a transcript can indicate that the venireman did not so interpret the question is by showing a clear explanation to him that the jury, in its sole discretion, decides what is a proper case for imposition of the death penalty. Nothing in the record indicates that such an explanation was given to the veniremen excluded in this case.

Veniremen Burns, Peterson and Nakata were apparently excluded merely because they stated "strong

feelings" against capital punishment.[1] Venireman Larsen did not even go that far. The trial judge and the prosecutor did all his talking on the record for him. And even Venireman Webber's statement that he "wouldn't be able to sign a death penalty" falls far short of the "unmistakably clear" test of *Witherspoon*. This Court's opinions in *Witherspoon* and its progeny can leave no doubt that these exclusions were in violation of the Constitution.

In *Boulden v. Holman*, 394 U.S. 478 (1968), this Court specifically considered whether veniremen might be excluded "merely by virtue of their statements that they did not 'believe in' capital punishment." *Id.* at 483. That opinion makes it abundantly clear that exclusion on any such "broader basis" will not pass muster. In *Boulder*, pains were taken to spell out what should have been obvious:

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[1]Statements made by Veniremen Nakata also suggest that he may have had some reservations about giving the death penalty in the case before the court, and these reservations may have been the basis for his exclusion. If this was the basis, his exclusion too was in violation of *Witherspoon*:

> "Just as veniremen cannot be excluded for cause on the ground that they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrow ground of exclusion." *Witherspoon v. Illinois, supra,* at 522 n. 21.

> "[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." *Id.* at 483-84.

In *Maxwell v. Bishop*, 398 U.S. 262 (1970), this Court specifically considered whether a venireman could be removed because he entertained religious or conscientious scruples against imposing the death penalty. Once again, the patent unconstitutionality of such exclusions was declared:

> "'[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.' 391 U. S., at 522. We reaffirmed that doctrine in *Boulden v. Holman*, 394 U. S. 478. As we there observed, it cannot be supposed that once such people take their oaths as jurors they will be unable 'to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.' 394 U. S., at 484. 'Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.' *Witherspoon v. Illinois, supra*, at 516 n. 9.

> "The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out . . . ." *Id.* at 265-66.

Lastly, the record in this case fails to show with respect to each of the *Witherspoon* criteria that the trial judge made any effort to specifically instruct any excluded venireman that the law required a juror to "subordinate his personal views to what he . . . [perceives] to be his duty to abide by his oath as a juror and to obey the law of the State," *Witherspoon v. Illinois, supra* at 514-15 n. 7. Thus, it simply cannot be said that any of the excluded veniremen made their views "unmistakably clear." As this Court noted in *Witherspoon:*

> "Obviously many jurors 'could, notwithstanding their conscientious scruples [against capital punishment], return . . . [a] verdict [of death] and . . . make their scruples subservient to their duty as jurors.'" *Witherspoon v. Illinois, supra* at 516 n. 9.

Hence, because the trial judge failed to instruct excluded veniremen as to their duty to subordinate their own personal views to the commands of the law as explained to them by the court, and because the trial judge failed to clearly determine that the excluded

veniremen could not subordinate their personal views and "abide by the law," each of the veniremen excluded in this case were removed in violation of this Court's pronouncement in *Witherspoon* and its progeny.

Nevertheless, in this case the Supreme Court of Illinois, relying on its earlier decision in *People v. Speck*, 41 Ill. 2d 177, 242 N.E.2d 208 (1968), upheld the death sentence on the grounds that "[t]he tenor of the entire examination . . . was unlike *Witherspoon* where the trial court promply removed all who expressed the slightest qualms about capital punishment", *People v. Moore, supra* at 82; 246 N.E.2d at 305 and because "[i]t is also clear in this case the State had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon*". *Id*, at 84; 246 N.E.2d at 306. Neither factor referred to by the lower court justified upholding the death sentence in the face of *Witherspoon*.

II.

The Question of Whether the Tenor of the Voir Dire in This Case Differed From That in Witherspoon Is Irrelevant to the Issue of Whether Veniremen Were Improperly Excluded.

The Illinois Supreme Court held that the death sentence could be imposed in this case because *Witherspoon* only applied to cases where veniremen were hastily and perfunctorily excused for voicing the slightest qualms regarding the death penalty. *People v. Moore, supra* at 83-84; 246 N.E.2d at 305-06. Led by the Illinois Supreme Court, a number of lower courts have likewise professed to recognize *Witherspoon's* tests, but have proceeded to avoid applying them.

The leading case is *People v. Speck, supra.* In that case the Illinois Supreme Court conceded that as

many as 50 veniremen had been excused "because they stated that they had conscientious scruples concerning the death penalty without stating that they would never impose or consider imposing it." *Id.* at 213; 242 N.E.2d at 227. Although clearly in violation of *Witherspoon's* requirements, the Illinois Court upheld the imposition on the sentence on the grounds that

> ". . . the tone of the proceedings here indicate a sincere desire on the part of the prosecutor and the court (although perhaps not shared by the defense) to determine the jurors' qualifications according to the standard later held acceptable in *Witherspoon.*" *Id.* at 209; 242 N.E.2d at 225.

The emphasis in *Speck* and later cases on the "tone of the proceedings" disregards the language and intent of *Witherspoon.* In *Speck, Witherspoon,* as well as in the present case, veniremen were excused for voicing mere general objections to the death penalty. In *Witherspoon* this Court said:

> "The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out. . . ." *Witherspoon v. Illinois, supra* at 516 n. 9.

On June 28, 1971, this Court reversed the death sentence in *Speck.* Just as the death sentences in *Wither-*

spoon and *Speck* have been reversed, so too must the death sentence in this case be reversed.

III.

The Availability of Peremptory Challenges to the State Does Not Render Harmless the Improper Exclusion of Veniremen Under Witherspoon.

The Illinois Supreme Court also upheld imposition of the death sentence in this case on the grounds that the state had sufficient peremptory challenges to have eliminated those prospective jurors improperly excluded under *Witherspoon*.[2] This argument was first suggested in *State v. Mathis*, 52 N.J. 238, 245 A.2d 20 (1968), *reversed as to judgment imposing death sentence*, ... U.S. ..... (1971), as a "relevant makeweight:"

> "And we think it correct to add that if the prosecution did not use all its peremptory challenges, that fact may be a relevant makeweight, for it is not unreasonale to assume that the remaining challenges would have been used, had the trial court ruled against the State on its objection to a specific juror. Here the State used only 7 of its 12 peremptory challenges." *Id.* at 251, 245 A. 2d at 27.

This argument would better be characterized as an irrelevant makeweight. It is purely conjectural whether the State would have used its peremptory challenges to exclude the scrupled veniremen. *Witherspoon* nowhere mentions the effect of the existence of remaining prosecution peremptory challenges. When a right as vital as a

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[2]The record disputes this finding. The state used 16 of its 20 peremptory challenges. Had the four remaining challenges been used, there would still have been at least four and probably eight improperly excused veniremen. (See Trial Record pp. 146, 162, 242, 269, 277, 281, 303, 322, 329, 342, 346 and 350.)

defendant's right to have a jury which is not unfairly "stacked" to condemn him to death is at issue, conjectural suggestions about whether a prosecutor might have used his peremptory challenges to remove a scrupled veniremen should not be permitted to override a clearly justifiable claim that some veniremen were excluded for cause in violation of *Witherspoon*.

This was the decision of the California Supreme Court in *In Re Anderson*, 69 Cal.2d 613, 619-20 (1968), wherein Justice Burke dealt with the "remaining peremptories" argument as follows:

> "The Attorney General also contends that any error under *Witherspoon* in excusing for cause prospective jurors opposed to the death penalty is nonprejudicial where, as here, the prosecution had sufficient peremptory challenges to remove all such jurors. The Attorney General asserts that since the chances of a jury's being able to determine the penalty impartially are diminished if the jury contains even one person who is hostile to, or has reservations concerning the death penalty, it may be assumed that, if the challenges for cause had not been available, the prosecutors would have excluded the veniremen in question by way of peremptory challenge; that a prosecutor may constitutionally exercise his peremptory challenges in a particular case for any purpose he deems proper (*Swain v. Alabama*, 380 U.S. 202, 221-222); and that therefore any error in excluding for cause the veniremen in question did not affect the composition of the juries at petitioners' trials and is not a ground for vacating the death sentences.
>
> "We do not agree. *Witherspoon* did not discuss the effect of the existence of remaining peremptory

challenges of the prosecution, but the broad language of the opinion establishes without doubt that in no case can a defendant be put to death where a venireman was excused for cause solely on the ground he was conscientiously opposed to the death penalty. According to our understanding of *Witherspoon,* reversal is automatically required if a venireman was improperly excused for cause on the basis of his opposition to the death penalty. It may be noted that in *Witherspoon* the *defense* had three remaining peremptory challenges when it accepted the jury, but that fact was not viewed as showing that the jurors who were impaneled were impartial and that therefore no harm resulted from improperly excusing for cause some prospective jurors. Furthermore, in arguing that it may be assumed that the prosecutor would have used his peremptory challenges to remove veniremen who under *Witherspoon* were improperly excused for cause, the Attorney General bases his argument on a concept of an impartial jury that is in conflict with the majority opinion in *Witherspoon.* Under the view of the *Witherspoon* majority a jury from which all prospective jurors opposed the death penalty have been excluded is not an impartial jury but rather constitutes a 'hanging jury,' one that is 'uncommonly willing to condemn a man to die,' and one that 'cannot speak for the community' but 'can speak only for a distinct and dwindling minority.' We cannot engage in conjecture that the prosecutor would have used his peremptory challenges to excuse all such jurors."

Conclusion.

As this Court has repeatedly recognized, the selection of a jury in any case, and particularly in a capital case, is of critical importance. Cases like *Speck* and *Mathis* indicate that lower courts have resisted the thoroughgoing application of *Witherspoon* which this Court intended. The most effective way to achieve such application is for this Court to specifically state that the improper exclusion of even one juror under *Witherspoon* will result in reversal of the death sentence.

There is no room for a *de minimus* doctrine regarding selection of a jury in a capital case. Every capital defendant should be entitled to a jury from which no prospective jurors were excluded for cause as a result of their general objections to the death penalty.

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APPENDIX.

Excerpts From the Record on Voir Dire Examination.

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57 Prospective jurors sworn to answer questions.

116 MALACHY BURNS, prospective juror:

117 Q. I see. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. I have a strong feeling against capital punishment, Judge.

Q. I see. And do you think that that feeling is such as would influence your judgment in this case?

A. It very well might.

The Court: What about it gentlemen? Mr. Horka, Mr. Mack.

118 Mr. Mack: Well, Judge,—

The Court: You may be excused.

Mr. Horka: Judge, he said it might or could. He hasn't made up his mind yet.

The Court: You may be excused. Step down, please.

Mr. Mack: For cause?

The Court: For cause, yes.

118 ESTHER BYRNE, prospective juror:

122 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. Well, ordinarily enough, I take the same stand as Mr. Byrne. I don't believe in capital punishment.

Q. In other words, even if we have a law in this State to that effect, you wouldn't believe in it. anyway?

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A. No, I don't, definitely not.

The Court: Very well. That's your prerogative. You're excused for cause.

146 PAUL LARSEN, prospective juror:

147 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. Well, I don't know whether I understand capital punishment. Is it death for death, an eye for an eye, a tooth for a tooth?

Q. Listen, in a murder case, the jury has a 148 duty to determine, first, whether the defendant is guilty or not guilty. You will be given multiple verdicts in this case. If you decide he is not guilty, that ends the case. Do you understand?

A. Yes.

Q. If you decide he is guilty of murder, then you must next determine whether or not you wish to return a verdict of death. If you so decide on a verdict of death, you will so indicate in your verdict. If you have determined the guilt of the defendant and decide against a verdict of death, you will return a verdict of guilty and the court will fix the term of punishment.

Do you understand that?

A. The court, the judge will?

Q. That's right, that's right. The law in this State, in a murder case, allows multiple verdicts. The first thing you decide is whether he is guilty or not. If you decide he is not guilty, that ends it. The jury after finding him guilty, will have to decide whether or not they want to inflict the death penalty. If you decide that you don't want to in-

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Record

flict the death penalty, you will say so and then the court will fix his punishment but it shall
149 not be death. The court cannot fix the death penalty unless the jury, having been asked for it, decides that.

Do you understand that?

A. In other words, when we go back to decide the verdict, we can either vote against the death penalty or for it?

Q. Oh, yes. The first thing that you have to determine is—

A. And what classifies that, the majority or they all have to vote the same way?

Q. No majority verdicts on anything in this State. It has to be the unanimous verdict of the twelve people on each one of those things, first, guilt or innocence. After that determination, if it's guilt then you go ahead and decide whether you want to inflict the death penalty or not.

A. Well, sir, I think I have to commit myself. I believe in the Bible, "Thou shalt not kill."

Q. The Bible has a lot of things in it.

A. That's one of the ten commandments.

Q. And I haven't seen any responsible religious official who says the Bible admonishes a jury not to follow the law.

150 A. That might be.

Q. What's that?

A. That might be.

The Court: I thought that's the highest thing, the law of God and then the law of man. But if that's your position, then, we will excuse you.

(Prospective juror excused.)

Page of
Record

LOUIS LORENS, prospective juror:

151 Q. Do you know of any reason why you cannot
152 be a fair and impartial juror in this case?

A. I do not believe in capital punishment.

The Court: Well, step down.

(Prospective juror excused.)

210 KATHERINE KRISTOCK, prospective juror:

212 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. I'm afraid I do. I don't believe in capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

221 ISAAC NAKATA, prospective juror:

222 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. I have a very strong prejudice against the use of capital punishment.

Q. I see.

A. Except in very limited area.

Q. Well, the law of this State prescribes capital punishment in certain types of cases,
223 and murder is one of them. Now, as I stated before, the jury will have to determine whether

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the defendant is guilty or not guilty of the charge that has been made against him.

A. Yes, sir.

Q. Then the jury will also have to consider whether it's a proper case for the death penalty. Now, do you believe that the State could present a case proper for the death penalty?

A. Yes, sir.

228 A. That's the reason why I would like to give my reasoning right now, before I perjure myself about that personally, because I can't go all the way on capital punishment.

Q You can't go all the way?

A. No.

Q. Where do you sop?

A. It depends on the kind of crime it is and the evidence presented for it.

Q. Oh, that's all we are asking you to do.

A. Well, it seems to me, from the statements made by the prosecuting attorney, that he is going to ask for the death penalty, so, in view of that fact, I think I should disqualify myself.

Q. If he asks for it, it doesn't mean that you have to give it to him.

A. Of course, that's true, too. But, at the same time, though, I mean, I wouldn't be applying the law, as he stated it, you see, upon his presentation of the evidence, and all that, so I don't think I would be fair to the court or to the rest of the jurors by my being on the jury.

The Court: Step down, then if you don't think

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229 you can be fair. I'm not going to ask you to try any further. The only question is, we want you to be fair and impartial.

(Prospective juror excused.)

248 MARIAN PETERSON, prospective juror:

250 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I have very strong convictions against capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

NEBRASKA PETTY, prospective juror:

252 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of a death penalty in a proper case?

A. I do.

The Court: Step down.

(Prospective juror excused.)

308 JACQUELINE B. THREATT, prospective juror:

309 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

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A. Yes, I do.

Q. You do: What do you mean?

A. I don't believe in capital punishment.

Q. Say that again.

A. I feel very strongly against capital punishment.

The Court: Step down, please. Call another juror.

325 ALBERT WEBBER, prospective juror:

Q. The gentleman on the end, your name, sir?

A. . .Albert Webber. Your Honor, I wouldn't be able to sign a death penalty.

Q. You wouldn't?

A. No, sir.

The Court: All right. Step down, Mr. Webber.

350 MARY GORSKI, prospective juror:

352 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do, your Honor.

The Court: All right, step down.

365 ANNA L. HOHNWALD, prospective juror:

366 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

a. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. Step down, please.

Service of the within and receipt of a copy thereof is hereby admitted this 3rd day of September A.D. 1971.

Proof of Service Enclosed

Supreme Court,
FILED
OCT 22 1
ROBERT SEAVER

IN THE

Supreme Court of the United States

No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Whether, during petitioner's trial for murder, any item of exonerating or material evidence was kept from petitioner.
2. Whether the introduction into evidence of a sixteen gauge shotgun deprived petitioner of a fair trial where there was no conclusive evidence as to what gauge shotgun killed the victim.
3. Whether prospective jurors were excused for cause in violation of *Witherspoon* v. *Illinois*, 391 U. S. 510.
4. Whether, because of ambiguities in the holding, *Witherspoon* v. *Illinois*, 391 U.S. 510, should be reconsidered or clarified.

STATEMENT OF THE CASE

On April 25, 1962, at approximately 10:00 P.M., Lyman Moore, petitioner herein, and a companion were drinking in a tavern owned by Bernie Zitek in the village of Lansing, Illinois. Moore began using profane language and, as a consequence, Zitek ejected him from the premises (R. 474-477).[1] Petitioner's companion was a dark-haired man, wearing a mustache and described as being about five feet ten inches tall (R. 509). Present at this time were Patricia Hill, a waitress, and approximately seven other customers. The petitioner was positively identified by Mrs. Hill as the ejected patron (R. 475). One hour later the petitioner returned to the tavern with a shotgun. He approached the bar, aimed the gun at Zitek and fired. The blast struck Zitek in the chest, killing him (R. 482-484). As petitioner fired the shot he was again observed by Patricia Hill, who later positively identified him as the murderer (R. 484). He was also identified by another eyewitness, Henley Powell (R. 525-526). The lighting conditions in the bar were good, and Mrs. Hill was only six feet from the petitioner (R. 483, 486).

After killing Zitek, petitioner fled the premises, pursued by Henley Powell (R. 527). Powell's pursuit ended when he was warned by petitioner not to come any further or he too would be shot: "Then he started hollering at me and says, 'Don't come any further or I'll shoot you too.'" (R. 529).

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1. "R" refers to the original transcript of proceedings at petitioner's trial.

Two days later (April 27, 1962), at a different tavern known as the Ponderosa Tap, a man known as "Slick" bragged to one Virgle Sanders that he had shot a bartender in Lansing (R. 587). Sanders identified petitioner at trial as the person he spoke to in the Ponderosa Tap (R. 578-579). William Joyce, the bartender at the Ponderosa, identified petitioner as the person with whom Sanders conversed in the tavern on April 27, 1962 (R. 555). Petitioner's companion on that occasion was "another fellow with dark hair and a mustache" (R. 561). Petitioner told Sanders and Joyce that he and his companion needed a ride to Harvey, Illinois; and Joyce accomodated, arranging for Bob Fair, owner of the Ponderosa Tap, to give petitioner a lift (R. 562-564). Bob Fair gave petitioner and his companion a ride to Harvey (R. 603). Fair's description of petitioner's companion matched that given by William Joyce and Patricia Hill (R. 603) and Fair further indicated that this individual's name was Barbee (R. 603, 605-606). During the trip to Harvey either Moore or Barbee—it is not clear from the record which—said "well, if we hadn't had that trouble with the bartender in Lansing, we'd have been all right" (R. 606).

On October 31, 1962, a Chicago police officer was on patrol when the occupants of a 1957 Ford automobile fired a shot and then fled from the car (R. 623-624). The car was staked out and a search of the area was conducted. A fully loaded 16 gauge shotgun was found in the back seat (R. 630). Registration papers found in the car indicated ownership in Jerry Barbridge. Other papers found in the car bore the signature of Jerry Barbee (R. 654). Later, while the car remained under surveillance, two men approached it and started to enter.

One was Lyman Moore; the other a dark-haired man wearing a mustache—Jerry Barbee (R. 684, 689). Both were arrested.

Petitioner's defense was alibi and he produced two witnesses to that effect. The first, Alex Koxhallari, was a bartender at a suburban country club (R. 746). He testified that petitioner was paid for working as a cocktail waiter on the evening of April 25, 1962. On cross-examination it was established that the witness had made a prior statement wherein he stated that he didn't remember if petitioner had been at the club that night (R. 757-760). Herbert Anderson, the manager of the country club (R. 765), testified that petitioner was an employee of the club but was unable to say that he had seen Moore on the night of April 25, 1962 (R. 773-777).[2] The only other defense witness was Donald O'Brien who was playing cards in the Zitek tavern at the time of the murder (R. 788). He testified that petitioner was not the man who was ejected from the tavern by the deceased (R. 793). Donald O'Brien was drunk at the time of the killing (R. 865, 878).

The jury found the petitioner guilty and recommended the death penalty (R. 1003). In a hearing on aggravation and mitigation the petitioner's efforts to reduce his penalty failed because of, *inter alia*, his five prior felony convictions (R. 1010-1012):

(1) 1946, larceny, one to five years;

(2) 1949, larceny, one to ten years;

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2. Petitioner unsuccessfully offered the same alibi defense in an earlier trial for a different armed robbery. See People v. Moore, 35 Ill. 2d 399, 406, 220 N.E. 2d 443 (1966), cert. den. 389 U.S. 861.

(3) 1957, bank robbery, seven years;
(4) 1957, Dyer Act, two years;
(5) 1962, armed robbery, twenty to forty years.

The sentence of the court was death (R. 1017).

Subsequently petitioner filed a petition under the Illinois Post Conviction Hearing Act (Ill. Rev. Stats. 1969, Ch. 38, Art. 122) and an evidentiary hearing was conducted. There Virgle Sanders was asked for the first time whether he had given a statement to the police and Sanders readily admitted that he had (R.P.C. 121). In this statement given April 30, 1962 Sanders said that he had met the petitioner six months prior to the conversation at the Ponderosa Tap. Sanders could not have met the petitioner when he said he did because Moore was serving a federal prison term at the time (Pet. Ex. No. 2; A. 354).[3] Moreover, one William Thompson, who was acquainted with a local resident named "Slick," told the police that Lyman Moore did not resemble the man known to him as "Slick" (R.P.C. 39, 63, 76, 84).[4] A bartender who also knew "Slick" told the police that he could identify "Slick" but was never called for that purpose (R.P.C. 38). These facts were not known to the defense at the time of trial. Neither were they known to the prosecution, and no one ever requested their production (R.P.C. 204, 347). The prosecutor's entire file was made available to defense counsel at the time of trial (R.P.C. 201).

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3. "A" refers to the Abstract of Record filed by petitioner in the Supreme Court of Illinois.

4. "R.P.C." refers to the original transcript of petitioner's post-conviction hearing.

Henley Powell testified at the trial that at the time of the crime he could see the front door of the tavern when Moore walked in with a weapon (R. 526). Officer Koppitz testified that a sketch he made showed Mr. Powell sitting in a northeast direction (R.P.C. 269)—away from the door—but also stated that it didn't matter because all of the people sitting at the table had an excellent view of the entire crime (R.P.C. 269). Further, he said "My diagram tells which way the people were seated, not which way they were looking" (R.P.C. 273). At the trial, the defense never requested any information from Officer Koppitz when he testified. His diagram (Pet. Ex. No. 5; A. 357, 358) was not in the prosecutor's file nor did the defense see it at trial.

The trial judge ruled that the defense had failed to meet its burden of proof and had not shown any suppression of evidence or any use of false testimony (R.P.C. 379-381).

On appeal the denial of post-conviction relief was affirmed by the Supreme Court of Illinois. Certiorari was granted on June 28, 1971.

SUMMARY OF ARGUMENT

The issues in this case are grounded upon allegations that the prosecution knowingly suppressed various items of material evidence and thus deprived the petitioner of a fair trial in violation of the due process clause of the fourteenth amendment.

These allegations are completely unsubstantiated by the record of the trial or by the record of the later proceedings upon petitioner's request for post conviction relief. Contrary to petitioner's argument, the complete record clearly establishes the State's compliance with the standards enunciated by this Court in *Brady* v. *Maryland*, 373 U.S. 83 (1963). The petitioner's trial was fair and completely satisfies the requirements of due process.

And further, the admission into evidence at trial of the sawed-off sixteen gauge shotgun which had been in the petitioner's possession at the time of his arrest was perfectly proper and consistent with the established practice in Illinois and in several other jurisdictions. There is no error.

Neither was there any constitutional violation in the selection of the jury which tried the petitioner. The record reflects that the voir dire examination of prospective jurors complied with the apparent standards of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) and violated no substantial right of the petitioner. In view of the absence of any infringement of the petitioner's federal constitutional rights, the respondent requests this Court to affirm the decision below.

ARGUMENT

I

THERE WAS NO CONCEALMENT OF MATERIAL OR EXONERATING EVIDENCE BY THE STATE.

Petitioner contends that there was an unconstitutional concealment of six items of exonerating evidence at trial. The facts allegedly concealed are as follows:

1. Virgle Sanders gave a written statement to the Lansing Police which stated that he first met the man known as "Slick" in Wanda and Del's tavern about six months prior to the murder.

2. Delbert Jones, the owner of Wanda and Del's told the police that he could identify "Slick" but was never called for that purpose.

3. Soon after Virgle Sanders supplied the name "Slick" to the Lansing Police, a suspect named James E. "Slick" Watts was apprended and photographed.

4. William Thompson, who was acquainted with a man named "Slick" failed to identify the defendant as that man.

5. After the passage of twenty-five months Virgle Sanders saw Lyman Moore at trial and observed that the man he knew as "Slick" was 30 or 40 pounds heavier than the defendant.

6. The Lansing Police file contained a diagram, drawn by a Lansing officer, that would have shown that Henley Powell was seated with his back to the entrance through which the defendant passed.

Undoubtedly; any individual circumstance or set of circumstances which exculpate or tend to diminish the quality and weight of the prosecution's case can be said to be relevant and can not be knowingly withheld from the

defense. However, broad generalizations on criminal discovery are of little aid in delineating the dimensions of due process in any particular case. It is imperative to keep in the mind this Court's mandate in this regard:

> We now *hold* that the suppression by the *prosecution* of evidence favorable to the accused upon *request* violates due process where the evidence is *material* . . ."

It is against the above standard that the prosecution's conduct in the instant case must be measured.[5]

The claim by petitioner that he was somehow improperly denied access to the prior statement of a witness is particularly ill-conceived. During trial petitioner's counsel asked several witnesses if they had given statements to the police. (R. 506, 538, 611). Every witness who had given such a statement admitted doing so and the statement was tendered. (R. 507, 531, 606). It is significant that the witness Sanders was *not* asked at trial if he had given a statement to police. Moreover, on the very first occasion when the question was put (at the post-conviction hearing), the witness readily admitted giving a statement to the police and the statement was promptly tendered to petitioner. (R.P.C. 121).

The record below also shows that the Assistant State's Attorney at trial displayed his entire file to the defense (R.P.C. 201). Thus any information which the petitioner now claims material was not in the direct possession of

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5. Brady v. Maryland, 373 U.S. 83, 88; United States ex. rel. Felton v. Rundle, 410 F. 2d 1300, 1306 (3rd Cir. 1969); United States ex rel. Fein v. Deegan, 410 F. 2d 13 (2d Cir. 1969), cert. den. 395 U.S. 935; Goetsch v. State, 45 Wis. 2d 285, 172 N.W. 2d 688 (1969); Peoples v. Hocker, 423 F. 2d 960 (9th Cir. 1970).

the prosecutor at trial. Since there is no claim of knowing suppression by the prosecutor of any evidence, the issue devolves to whether it is the obligation of a prosecuting attorney to ferret out every conceivable piece of potentially impeaching evidence that may be contained in police files. The promulgation of such a rule is neither realistic nor necessary for the fundamental fairness due every defendant. A major murder investigation may involve scores of fruitless leads. The search for the phantom "Slick" in the present case is but an example. It is singularly naive and unfair to impose upon prosecutors the responsibility to interrogate police officers in an effort to elicit facts which when viewed in hindsight might have a marginally favorable bearing on the conduct of the defense.

Unquestionably no prosecutor may engage in knowing suppression of evidence. However, the Constitution and the proper administration of criminal justice demand of the prosecution good faith and a quest for truth. They do not require an inquiry into all the areas of police investigation with an eye toward preventing possible inadvertent and immaterial omissions.

Admittedly police misconduct resulting in the suppression of material evidence even without the prosecutor's knowledge cannot be condoned. This, however, has not been shown to be the case here. Moreover, a state post-conviction proceeding, designed for just such an inquiry, produced no contrary conclusion.

It is submitted that there must be a showing of intent or knowledge before an unconstitutional suppression takes place. The underlying standard of conduct at trial must be fundamental fairness. Defendants cannot hope to obtain reversals upon subsequent findings of minutiae in

police files. Virtually every investigatory file will contain some fragmentary evidence which may cast doubt on the perceptive abilities of witnesses. Very often such files will also reveal the existence of persons who may have been suspected of involvement at one time. But in the course of investigation facts are uncovered which absolve some parties and further implicate others. In the gradual shift from investigation to accusation the focus of guilt sharpens to include only the very few. In some cases the sifting process rejects all but one. Here, the overwhelming evidence established Lyman Moore as that person.

When the decision is made to prosecute, the State's Attorney has usually received all relevant evidence: both inculpatory and exculpatory. Occasionally it will happen that minor items of evidence will not be turned over simply because the police view them as immaterial. Neither common sense nor the Constitution require a complete and detailed accounting of all police work on a case. The defense has no right to such information and has cited no case to substantiate such a claim.

Particular emphasis has been laid on the fact that Virgle Sanders, unknown to defense counsel, informed the Lansing Police that he had first met the defendant about six months prior to the murder. Petitioner claims that this is highly impeaching and exculpatory. The State cannot agree.

Sanders was demonstrably in error since Lyman Moore was serving a federal prison term at the time. At the worst, it simply shows that Virgle Sanders, like many people, is not adept at estimating time. The period of six months was only a guess. At the post-conviction hearing defense counsel called Virgle Sanders' attention

to the incident at the Ponderosa Tap two days after the murder. Sanders had testified at trial that Lyman Moore was present at the tavern and that they had a conversation (R. 578-579) in the course of which Moore said that it was "open season on bartenders" (R. 583) and that he had shot one in Lansing (R. 587). In laying the foundation for Sanders' relationship with Moore, the prosecutor asked Sanders whether he had known petitioner before that day. Sanders replied that he had, but that he couldn't estimate how long he had known Moore (R. 580). At the post-conviction hearing, defense counsel asked Virgle Sanders whether he had given the Lansing Police a signed statement that he had met Lyman Moore six months prior to the incident at the Ponderosa Tap. Sanders, who has a fourth grade education, said that he could not read the long hand statement (he can only read printed words) and that the six month period was only a "rough guess" (R.P.C. 124). In answer to further questioning, Sanders said, ". . . it could have been from two, three months to nine months. I don't know" (R.P.C. 125).

A second source of contention springing from Sanders' comments to the Lansing Police entails a confusion of identities between the petitioner and a man named "Slick." At the post-conviction hearing, Sanders admitted that the person whom he knew as Slick, and that he had met several months earlier, wore his hair differently (R.P.C. 134), was heavier and did not wear glasses (R.P.C. 130). Sanders, in answer to a leading question, said that if Lyman Moore was in prison at the time he first met "Slick," it would have been impossible for Lyman Moore and "Slick" to have been the same person (R.P.C. 132-133).

Notwithstanding this confusion of identities, it is the State's view that Virgle Sanders' murky recollections of a man named "Slick" are irrelevant to his positive identification of Lyman Moore as the man he knew and spoke with at the Ponderosa Tap. Sanders' statements are buttressed by the testimony of two other men who saw him speak to Lyman Moore at the Ponderosa.[6] The first, William Joyce, was the bartender at the Ponderosa on that day (R. 552, 554-555). He testified that he served several drinks to Virgle Sanders and Lyman Moore, and observed them talking (R. 561-562, 564). Joyce also said that Moore asked him for a ride (R. 562). Joyce accommodated Moore by arranging for a ride with Robert Fair, the owner of the tavern and the second man to observe Lyman Moore speaking with Virgle Sanders (R. 562, 564, 600-602). Fair drove Lyman Moore and his companion to Harvey, Illinois (R. 602-604). In the course of the automobile trip to Harvey Fair heard one of them say, "Well, if we hadn't had that trouble with the bartender in Lansing, we'd have been all right" (R. 606).

Thus, Virgle Sanders' confusion of identities between the petitioner and the ubiquitous "Slick" and when he first met him, is scarcely material to the facts established. The proof that Lyman Moore and Virgle Sanders met and spoke together at the Ponderosa is overwhelming.

The same could be said of all the State's evidence. In addition to the two eyewitnesses who saw the petitioner kill the bartender, a third witness stated that he heard Moore brag about the murder. Any further question

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6. It is relevant to note that neither of these two men were called as witnesses by defense counsel at the post-conviction hearing.

about Moore's identity is dispelled by two more witnesses who saw him speaking to Sanders at the time and place in question. The capstone is found in the off-hand admission made in Fair's automobile.

Petitioner contends that State witness Henley Powell perjured himself when he testified that he saw Moore enter the tavern and shoot the deceased; that Officer Koppitz's diagram of the premises, which did not come to light until after the trial, somehow proves that Powell was not facing the front door but was seated at a card table facing in the other direction and could not have seen what he testified to seeing. Petitioner engages us in this exercise in an effort to enhance the credibility of defense witness Donald O'Brian who was also seated at the card table and testified that Moore was not the man ejected from the tavern. (O'Brian, it will be remembered, was drunk and did not see the actual shooting). Completely overlooked in petitioner's commentary on Powell's veracity and the importance of the "suppressed" diagram is the actual testimony of Mr. Powell.

At the time of the murder he was playing pinochle with three other gentlemen (R. 536). His position at the table gave him a view of the bartender (R. 526). Because he could not bid in the game he laid his hand down and was looking toward the front door when Moore walked in (R. 526, 536). After the shooting he chased Moore but retreated when warned by petitioner that too might be shot (R. 529). As for the diagram, Officer Koppitz testified that it "tells which way the people were seated, not which way they were looking" (R.P.C. 273). The diagram discloses nothing that was not brought out in Powell's testimony at trial.

In affirming petitioner's conviction the Supreme Court of Illinois was in total harmony with constitutional standards for criminal discovery. In order to constitute a violation of due process, favorable evidence must be suppressed by the prosecution after it has been requested by the defense. Moreover, the evidence must be *material* either to guilt or to punishment. *Brady* v. *Maryland*, 373 U.S. 83 (1963). Certainly any of the items complained of here would not have disturbed the finding of guilt or the setting of the death penalty. The fact that two eyewitnesses successfully identified Moore as the killer has not been overcome.

Nor does the failure to produce any of the above items come within the constitutional prohibition against the knowing use of false evidence. *Miller* v. *Pate*, 386 U.S. 1 (1966). No false evidence was used against the defendant. Virgle Sanders' incorrect estimate of when he first met petitioner is not false evidence. He spoke the truth according to the best of his recollection. A mistaken belief is not perjury. Even if Sanders' miscalculation (or any of the other items complained of) could be characterized as "false evidence," they did not play a "vital part in the case for the prosecution" as required by *Miller* v. *Pate*.

The Second Circuit has explored the various standards for reversal in cases of suppression in *United States* v. *Keogh*, 391 F. 2d 138 (2nd Cir. 1968). The court isolated three categories:

> (1) deliberate suppression in which the court includes "not merely a considered decision to suppress, taken for the very purpose of obstructing, but also a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention" (pp. 146-147);

(2) suppression by the prosecution of evidence favorable to the accused upon request;

(3) and "where hindsight discloses that the defense could have put the evidence to not insignificant use" (p. 147).

In the court's view the first two situations present no difficulty. The third presents a problem. The court concludes that while in some instances relief should be granted, the standard of materiality must be considerably higher than the usual level of probity required for admissibility. The State subscribes to this analysis and suggests that in this case the evidence does not reach this high level of materiality.[7]

It has never been held that the prosecution's duty to disclose extends to all evidence possibly admissible and useful to the defense. Nor has it been established what specific degree of prejudice must be shown in order to warrant a new trial. The cases, however, indicate that insignificant items of unproduced information will not overturn a conviction. The evidence suppressed in *Giles* v. *Maryland*, 386 U.S. 66 (1967), is representative of the sort of withheld data which has produced reversals. In *Giles* the State suppressed evidence which would have severely discredited the prosecutrix in a rape case. The effect of the evidence would have been sufficient to show that the "victim" of the rape was blatantly promiscuous and had probably consented to relations with the defendants. Thus, the effect of the evidence in *Giles* and other cases along this line of decisions has been such as would have produced an acquittal or substantial reduction in sen-

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7. Compare United States ex rel Fein v. Deegan, 410 F. 2d 13, 20 (2d Cir. 1969), cert. den. 395 U.S. 935.

tence. Neither of these criteria have been met in the present case. To grant a reversal in the instant case would be an invitation to every defendant to search for inconsistencies in the investigator's files long after his conviction. The impact on our present system of criminal justice can only be imagined. The Eighth Circuit has pondered the implications in *Johnson* v. *Bennett*, 386 F. 2d 677, 680 (8th Cir. 1968):

> "[A]ll the Supreme Court cases setting aside convictions for want of due process by reason of the reception of false testimony are based upon the knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed. Such would appear to be a proper limitation to the rule. If convictions could be set aside years after they become final merely upon proof that some testimony of a witness proved to be false, there would be no finality to convictions and the orderly administration of justice would be unduly hampered."

In addition to these policy considerations, there remains the simple fact that a fair trial was not denied the petitioner, and no knowing suppression of material evidence took place.

II.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE ADMISSION INTO EVIDENCE OF A SAWED-OFF SIXTEEN GAUGE SHOTGUN.

The petitioner here claims that it was error to admit into evidence a sawed-off sixteen gauge shotgun on the premise that the deceased was killed with a twelve gauge shotgun.

It is a well established principle in Illinois[8] and elsewhere[9] that circumstances of the arrest may be brought before the jury. Here shots were fired and the police saw men fleeing from a car (R. 623-624). Petitioner was later arrested entering the very same car (R. 682). In the back seat of the car was a loaded sixteen gauge shotgun (R. 630-641).

The Illinois rule is stated in *People* v. *Smith*, 413 Ill. 218, 221, 108 N.E. 2d 596, 597 (1952), where it is said:

> "[W]eapons found in a defendant's possession or control at the time of his arrest on a murder charge may be the subject of testimony pertaining to the details of the arrest."

Thus, the shotgun was admissible purely on the ground that is was clearly in constructive possession of those arrested.[10] It was also admissible on independent grounds of relevance. The only evidence in the record as to the weapon in the crime was medical testimony that a shotgun was used. The witness, however, stated that he did not know what size shotgun was involved (R. 573). The only other evidence was a stipulation offered by the defense at the conclusion of their case that if a certain

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8. E.g. People v. Wright, 30 Ill. 2d 519, 198 N.E. 2d 316 (1964); People v. Jackson, 9 Ill. 2d 484, 138 N.E. 2d 528 (1956); People v. Trice, 127 Ill. App. 2d 310, 262 N.E. 2d 276 (1970).

9. E.g. People v. Beltowski, 71 Cal. App. 2d 18, 162 P. 2d 59 (1945); Chase v. State, 415 P. 2d 203 (Okl. Cr. 1966).

10. Concerning petitioner's previous relationship with the sixteen gauge sawed-off shotgun see People v. Moore, 35 Ill. 2d 399, 220 N.E. 2d 443 (1966), cert den. 389 U.S. 861.

police technician was called he would testify that in his opinion a twelve gauge shotgun was used (R. 853). Hence, no conclusive proof was ever adduced to show what gauge shotgun was used to execute Bernie Zitek.

The general rule has always held that is is proper to admit into evidence any weapon found within the defendant's control, suitable for the commission of the crime charged, even though there is no showing that it is the actual weapon used.[11] Thus, in the case of *People* v. *Lenhardt*, 340 Ill. 538, 549, 173 N.E. 155 (1930), the Supreme Court of Illinois said:

> "It is competent to prove that an accused person, when arrested, possessed a weapon suitable for the commission of the crime charged against him, even though no claim is made that he actually used it in committing the particular crime."

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11. E.g. Shiflett v. State, 38 Ala. App. 662, 93 So. 2d 523 (1957); People v. Lane, 56 Cal. 2d 773, 366 P. 2d 57, 16 Cal. Rptr. 801 (1961); People v. Nichols, 171 Cal. App. 2d 320, 340 P. 2d 727 (1959); People v. Nelson, 224 Cal. App. 2d 238, 36 Cal. Rptr. 385 (1964); People v. Lindsay, 227 Cal. App. 2d 82, 38 Cal Rptr. 755 (1964); State v. Dillon, 161 N.W. 2d 738 (Iowa 1968); State v. Ricks, 242 La. 823, 138 So. 2d 589 (1962); People v. Magby, 37 Ill. 2d 197, 226 N.E. 2d 33 (1967); People v. Johnson, 35 Ill. 2d 516, 221 N.E. 2d 497 (1966); People v. Trice, 127 Ill. App. 2d 310, 262 N.E. 2d 276 (1970); Strickland v. State, 226 Ga. 750, 177 S.E. 2d 238 (1970); People v. Hall, 19 Mich. App. 95, 172 N.W. 2d 473 (1969); People v. Lumpkin, 27 Mich. App. 143, 183 N.W. 2d 384 (1971); Garton v. State, 454 S.W. 2d 522 (1970); Harris v. State, 450 P. 2d 857 (Okl. Cr. 1969); State v. Peele, 75 Wash. 2d 28, 448 P. 2d 923 (1968); Pryor v. State, 449 S.W. 2d 482 (Tex. Crim. 1969).

The foundation for this rule of evidence is easily understandable. Most cases ultimately turn on the conclusions reached by the finder of fact. In many cases physical evidence is adduced which is related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Such evidence does not usurp the province of the jury, since the jury does not have to accept the witness' opinion. *Miller* v. *Pillsbury,* 33 Ill. 2d 514, 516, 211 N.E. 2d 733 (1967). Illinois courts have not abandoned the principle that such opinion evidence should be received with caution. *Thomas* v. *Cagwin,* 43 Ill. App. 2d 336, 193 N.E. 2d 233 (1963). There is always the possibility that a given expert in the field of weaponry is simply wrong in his deductions. And in this case the witness' expertise was not established in the record. It is, therefore, quite understandable why Illinois courts will permit the introduction of a weapon found within a suspect's control at the time of his arrest which is suitable for the commission of the crime charged, even though no claim is made that he actually used it on the occasion in question. Accordingly, in the case of *People* v. *Ostrand,* 35 Ill. 2d 520, 221 N.E. 2d 499 (1966), a "snub-nose" revolver was used in a robbery. A larger revolver was found on the defendant at the time of his arrest and admitted into evidence. It was held that such a discrepancy goes only to the weight of the evidence and not the admissibility. In the instant case there is a diminutive amount of evidence in the record to establish the size of the shotgun used in the murder. It is entirely possible that the weapon found in the petitioner's possession could have been the murder weapon. There can be no doubt that the shotgun found at the time of petitioner's arrest was similar to the murder

weapon and was, therefore, properly admitted into evidence.[12]

For these reasons it is apparent that the weapon was not used against the petitioner to denounce him as a "bad man" without regard to his guilt or innocence. It is a well established rule that evidence of prior crimes cannot be introduced when it has no purpose other than to show criminal disposition. *Spencer* v. *Texas*, 385 U.S. 554 (1961). There are, however, numerous instances where evidence of prior crimes is admissible. In such cases the probative value of the evidence outweighs the possible prejudicial effect on the jury. Here, there was a distinct possibility that the shotgun in evidence was the very same gun that killed the bartender. Moreover, ready access to a loaded shotgun could be considered a part of the petitioner's modus operandi.[13]

It is clear that the "other crime," when it is found to be independently relevant and admissible, need not be established beyond a reasonable doubt, either as to its commission or as to the defendant's connection therewith. 1 Wharton, Criminal Evidence, § 366 (11th ed. 1935). The decision as to whether the logical relevance of the gun counterbalances any improperly damaging effect on the petitioner was with the trial court. Here, the

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12. Indeed, there is authority which would permit the introduction of the weapon merely for illustrative purposes. See People v. Aguirre, 158 Cal. App. 2d 304, 322 P. 2d 478 (1958), and cases collected in State v. Mays, 7 Ariz. App. 90, 436 P. 2d 482 (1968).

13. Petitioner and his companion Barbee used the same sixteen gauge shotgun in a July 27, 1962 armed robbery. People v. Moore, 35 Ill. 2d 399, 220 N.E. 2d 443 (1966), cert. den. 389 U.S. 861.

possibility that the shotgun could have been the murder weapon, plus its distinctive character tending to show a modus operandi,[14] combine to establish a high degree of relevancy. In the instant case the trial judge clearly acted within his permissible discretion in affirmatively weighing the actual need for the admission of the shotgun in the light of the issues and the evidence.

III.

THE SELECTION OF THE JURY IN THIS CASE DID NOT VIOLATE THE CONSTITUTION NOR DID IT AFFECT ANY SUBSTANTIAL RIGHT OF THE PETITIONER.

A.

The Opinion In Witherspoon v. Illinois Should Be Clarified Or Reconsidered.

On June 3, 1968, this Court rendered its opinion in *Witherspoon* v. *Illinois,* 391 U.S. 510, and gave that decision full retroactive application. Since that date, a significant number of problems have arisen from the attempts of the various states to interpret and to implement the decision. Both the importance of these problems and their multiplicity indicate a critical need for a clarification or a reconsideration by this Court of the holding in *Witherspoon.*

For example, experience with the *Witherspoon* rule has shown that its application probably worsens the posi-

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14. See People v. Sheets, 251 Cal. App. 2d 759, 59 Cal. Rptr. 777 (1967); Shiflett v. State, 38 Ala. App. 662, 93 So. 2d 523, 525 (1957).

tion of the defendant in a capital case. In discussions with prosecutors throughout the country and in our own experience, we have found that nearly every person who disqualified himself under the pre-*Witherspoon* standards will also disqualify himself under the post-*Witherspoon* standards. The few jurors who do not so disqualify themselves can invariably be eliminated by peremptory challenges.

Thus, the defense gains no real advantage if *Witherspoon* is followed. The prosecution, however, does gain an advantage and that advantage becomes apparent to anyone who watches a post-*Witherspoon voir dire*.

First, a number of jurors in pre-*Witherspoon* days who qualified for service because of the statement that they lacked scruples will now disqualify themselves when asked about their willingness to consider actual imposition of the death penalty. In our experience there are more of such jurors than there are jurors who, while declaring the existence of scruples, will still state that they could consider imposition of the death penalty. In sum, the prosecution may well gain in the number of challenges for cause if *Witherspoon* is followed.

Second and far more important tactically than the gain in challenges for cause, is the increase in knowledge about the juror gained from a post-*Witherspoon voir dire*. When a lawyer or a judge asks the prospective juror if he has any conscientious scruples against the death penalty and the venireman answers that he does not, the prosecution has little to guide its judgment as to the true feelings of the juror. The juror might be opposed to capital punishment generally but without conscientious or religious scruples. Or the juror, while approving of the death penalty, might not be willing to

sign a capital verdict himself or might do so only in the rarest case. And experience has shown that there are a number of such jurors. For this reason defense counsel often objected to questioning of veniremen that descended from the levels of conscientious scruples and sought to determine the actual ability of a juror to return a capital verdict. The reasons for such objections were also grounded on the theory that repeated questioning of jurors "indoctrinated" them with respect to the death penalty.

Under *Witherspoon*, however, such questioning is not only permissible but required. And when the juror has answered three or four searching questions on his ability to consider the death penalty, the prosecution has a very good basis for judgment as to whether the juror would really return a capital verdict. The demeanor of the venireman and the manner in which he answers the *voir dire* will nearly always give the prosecution a clear guide as to whether it should exercise a peremptory challenge. Instead of the old, ineffective shot in the dark, the prosecution can make exceptionally effective use of its peremptory challenges in capital cases.[15]

The defense gains no similar benefit from insight into the venireman's real views. For it must exercise its peremptory challenges unaided by the challenge for cause which helps the prosecution eliminate jurors it finds undesirable.

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15. The application of Witherspoon in states where attorneys are not permitted to ask questions for the purpose of uncovering information useful only as a basis for exercising peremptory challenges is especially helpful to the prosecution.

In theory of course, the defense has a challenge for cause similar to that of the prosecution; it can have dismissed any venireman who would always vote for the death penalty no matter what the evidence.[16] But in fact, few if any jurors will take this position and the challenge is rarely appropriate.

Witherspoon, therefore, improves the prosecution's position in relation to impanelling a capital jury by (a) failing to reduce significantly the number of jurors excused for cause and (b) increasing the effective use of prosecution peremptory challenges and (c) according to some defense lawyers, enabling the prosecution to indoctrinate jurors concerning the death penalty.

Furthermore, the Court's decision to give retroactive application to its holding in *Witherspoon* has resulted in several procedural quagmires. The number of cases affected by *Witherspoon* and the array of state and federal precedents sustaining jury selections held improper by *Witherspoon* are more impressive than some similar arrays of prior decisions in areas where the court has limited its holding. See *Desist* v. *United States*, 394 U.S. 244 (1969). Of more importance are the procedural problems created by the enforcement of the decision in past cases. The Court failed to consider that State procedure will not always allow the easy separation of issues of guilt and punishment. In several States the absence of any procedure for resentencing has resulted in a complete reversal

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16. Eg. Stroud v. United States, 251 U.S. 380, 381 (1920); Turberville v. United States, 303 F. 2d 411, 421 (D.C. Cir. 1962). See United States v. Puff, 211 F. 2d 171, 182 (2nd Cir. 1954); People v. Hobbs, 35 Ill. 2d 263, 272, 220 N.E. 2d 469, 473-74 (1966).

and retrial of both guilt and punishment issues.[17] Nor did the Court consider the problem that arises where the *voir dire* of the jury is not recorded.[18] The Court did not deal with the question of waiver.[19]

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17. Ellison v. State, 432 S.W. 2d 955 (Tex. Crim. 1968); Ex parte Bryan, 434 S.W. 2d 123, 124-126 (Tex. Crim. 1968); State v. Spence, 274 N.C. 536, 164 S.E. 2d 593 (1968); State v. Turner, 253 La. 763, 220 So. 2d 67, 68-69 (1969) (cases on direct appeal); State v. Benjamin, 254 La. 49, 222 So. 2d 853, 854-55 (1969); See also Pa. Stat. Ann. Tit. 18 § 4701 (1963).

18. The problem is not a minor one. The usual provisions of State law require the recording of jury selection upon the request of either party. In response to Witherspoon it has been held that jury selection should be recorded in the future. Pittman v. State 434 S.W. 2d 352 (Tex. Crim. 1968). However, where the record was not kept for lack of request the challenge to jury selection procedures has been rejected. Joseph v. State, 442 S.W. 2d 397 (Tex. Crim. 1969); State v. Forcella, 52 N.J. 263, 245 A. 2d 181, 196 (1968); Gaddis v. Page, 455 P. 2d 699 (Okla. Cr. 1969). As an alternative, evidence or stipulation as to what transpired at the voir dire has been taken and the issue reached in that fashion. Lokos v. State, 221 So. 2d 689 (Ala. 1969). See also Brent v. White, 398 F. 2d 503 (5th Cir. 1968); Yates v. Breazdale, 402 F. 2d 113, 115 (5th Cir. 1968). The problem with the latter method is that a correct ruling on Witherspoon may require very exact rendering of the voir dire which is impossible without a verbatim transcript.

19. Seemingly if a ruling is retroactive in effect and the actions of a trial court in failing to follow it are violative of the defendant's rights, then the failure of the defendant to object should waive the violation. However, the question of waiver is not so simple. The Supreme Court of California has, in reversing convictions, been very solicitous of trial judges, explicitly absolving

These problems arose, at least partly, from the fact that the ground of decision in Witherspoon was not the ground argued by the parties.[20]

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them from blame for failing to see into the future. In re Anderson, 69 Cal. 2d 613, 447 P. 2d 117, 120-123 (1968); In re Arguello, 71 Cal. 2d 13, 452 P. 2d 921 (1969); In re Seiterle, 71 Cal. 2d 698, 456 P. 2d 129 (1969); People v. Gardner, 71 Cal. 2d 843, 457 P. 2d 575 (1969); People v. Washington, 71 Cal. 2d 1061, 458 P. 2d 479 (1969); In re Hill, 71 Cal. 2d 997, 458 P. 2d 449 (1969); see also State v. Turner, 253 La. 763, 220 So. 2d 67 (1969).

However, the doctrine of waiver has been applied if something more than mere silence on the part of the defendant can be found in the record, i.e. specific agreement or stipulation to excuse a juror, or failure to ask questions to clarify the status of a juror's opinions. See People v. Coogler, 71 Cal. 2d 153, 454 P. 2d 686 (1969); State v. Pace, 80 N.M. 364, 456 P. 2d 197, 199-202 (1969); Pittman v. State, 434 S.W. 2d 352 (Tex. Crim. 1968); Scott v. State, 434 S.W. 2d 678 (Tex Crim. 1968).

In two cases defendants sought affirmance of their convictions and death sentences and the California Supreme Court ignored their requests since death penalty appeals are automatic in California. See People v. Goodridge, 70 Cal. 2d 824, 452 P. 2d 637 (1969); People v. Stanworth, 71 Cal. 2d 820, 457 P. 2d 889 (1969). Parenthetically, it seems that any statute which would prevent a man from waiving his appeal even if it results in his death is itself unconstitutional. Cf. In re Brooks Estate, 32 Ill. 2d 361, 205 N.E., 2d 435 (1965). (Jehovah's Witness has a constitutional right to refuse medical treatment even if such refusal would result in her death).

20. In state court, Witherspoon argued that disqualification of jurors with conscientious scruples against the death penalty caused him to be tried before a jury unable to determine fairly his guilt or innocence. He did not challenge the fairness of the jury on the issue of

The Court failed to reach the issue of the jury's fairness on the guilt—innocence question because "the data adduced are too tentative and fragmentary." (391 U.S. at 517). Yet the conclusion as to the jury's impartiality on the issue of punishment was reached with no data at all because it was "self-evident." Perhaps with adequate briefing the Court would have abandoned its holding or would at least have found some basis more substantial for its proposition than that it was "self-evident".

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punishment. His argument was that the legitimate interest of the State is securing a fair jury on the issue of punishment should not prejudice his right to a fair jury on guilt or innocence. He offered studies concluding that jurors without conscientious scruples were "prosecution prone" on the issue of guilt or innocence. The Supreme Court of Illinois affirmed the denial of relief. People v. Witherspoon, 36 Ill. 2d 471, 224 N.E. 2d 259 (1967).

Witherspoon then sought certiorari raising several questions but failing again to challenge the fairness of the jury on the issue of punishment. This Court granted certiorari but limited to considering whether the jury selection process "assured the State of a jury whose members were partial to the prosecution on the issue of guilt or innocence in violation of the petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution." (Emphasis added). 389 U.S. 1035 (1968). This language was echoed in the grant of certiorari in a companion case. *Bumper* v. *North Carolina*, 389 U.S. 1034 (1968).

However, when Witherspoon filed his brief he raised, for the first time in a brief passage, the question of the jury on the issue of punishment. Yet he still did not ask for a vacation of sentence—only for a new trial. The prosecution, noting that the question was not properly before the court, stated that it would not reply to the argument unless requested to do so. See Brief for Respondent Woods, Witherspoon, v. Illinois pp 37-38.

The lack of argument had a devastating effect on the quality and clarity of the decision and it is this that the passage of time has revealed most clearly.[21]

The most immediate problem arising from the lack of argument on the issue decided was a severe lack of focus in the holding. It is difficult to state with assurance the holding of the case. The text of the opinion and one footnote offer at least three separate standards for jury selection in capital cases.[22]

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21. The Court relied, for example, on a Gallup Poll of 1966 to show that persons favoring capital punishment were a "distinct and dwindling minority." To-wit, 42%. (391 U.S. at 520, n. 16). Yet the same poll showed that persons without scruples against inflicting capital punishment constituted 65% of the population. This latter figure is the more meaningful since jurors were not asked if they favored capital punishment; rather they were asked if they had scruples against its infliction. In any event, polls are hardly a good basis for lasting doctrine. According to Gallup the number of persons favoring capital punishment "dwindled" from 42% in 1966 to 51% in 1969. (Gallup Poll Report, February 16, 1969). In a recent referendum, conducted in concert with a vote on whether to adopt a new state constitution, the voters of Illinois rejected a ballot proposition to abolish capital punishment. 64.3% of those voting favored retaining capital punishment while only 35.7% opted for abolition. Just under 2,000,000 votes were cast on the proposition. [Illinois Secretary of State, Constitution of the State of Illinois and United States 13, 15 (1971)]. To whatever extent Witherspoon relied on polls, it has been proven to rest on an insufficient foundation.

22. In the text of the opinion the Court said:

> "Specifically, we held that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for

What then is the holding? Is it the somewhat flexible minimum standard in the text? Is it the standard of the footnote, i.e., willingness to consider all the penalities?

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cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (391 U.S. 510, 521-22)

However, in a long footnote to this statement the Court said:

> "Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." (391 U.S. 510, 522 n. 21)

And in the second paragraph of this same footnote the Court added:

> "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause

What is the meaning of the second paragraph of the footnote which lays down a very rigid standard but provides that "nothing we say today bears upon" the application of this standard?

In *Bumper* v. *North Carolina*, 391 U.S. 543, 545 (1968), a companion case decided the same day with opinion written by the same Justice as in *Witherspoon*, the Court said:

> "In *Witherspoon* v. *Illinois* * * * we have held that a death sentence cannot constitutionally be executed if imposed by a jury from which have been excluded for cause those, who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty."

The ambiguity in the holding is clearly illustrated in the following passage from *Witherspoon*:

> "If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, *it could argue* that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all

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were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Nor does the decision in this case affect the validity of any sentence other than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this or any other case." (391 U.S. 522-523).

who opposed it in principle, the State crossed the line of neutrality." (391 U.S. 510, 520, emphasis added).

What kind of exclusion of jurors is permitted? What kind is prohibited? What standards were approved? What standards were disapproved? What did the Court decide? Except in certain cases at the ends of the spectrum the answers to these questions are not known.[23]

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23. The California experience is particularly illustrative of the confusion generated by lack of focus in the Witherspoon opinion.

The Supreme Court of California has ruled on the applicability of Witherspoon in numerous reported opinions. The court has stated the applicable test in terms of the second paragraph of footnote 21 i.e., it must be unmistakably clear that the juror would automatically vote against the death penalty regardless of the evidence or that the juror's attitude toward the penalty would prevent an impartial decision on the defendant's guilt. E. G. In re Anderson, 69 Cal. 2d 638, 447 P. 2d 117, 120-23 (1968); People v. Washington, 71 Cal. 2d 1170, 459 P. 2d 259, 264-65 (1969). But even this clear choice of standard has not avoided serious problems.

The most obvious of these problems is that jurors often do not make unmistakably clear answers to questions on voir dire. This tendency to give equivocal answers is increased substantially when questioning becomes extensive and probing. The net result of an attempt to apply a rigid standard to an inherently equivocal sort of proceeding is a course of basically inconsistent decisions. In other words, it is difficult to tell why or how the Supreme Court of California differentiates between the cases it affirms and those it reverses.

For example, in a series of cases the Court disapproved excusing a juror despite the fact that a juror "believes"

The Court did not deal with the effect of peremptory challenges on jury selection in capital cases. Certainly the Court did not overrule its long standing doctrine that peremptory challenges are a matter for each party to exercise as it sees fit. *Swain* v. *Alabama*, 380 U.S. 202, 221-222 (1965). Presumably the prosecution could exer-

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or "really feels" he could not consider the death penalty, (People v. Vaughn, 71 Cal. 2d 406, 455 P. 2d 122, 125-28 (1969).) Or that a juror "did not think" he could assess the penalty, (People v. Osuna, 70 Cal. 2d 811, 452 P. 2d 678 (1969).) Or that a juror said "I don't think I could send anyone to death", (In re Hillery, 71 Cal. 2d 857, 457 P. 2d 565, 566-70 (1969).) Or that a juror said "I cannot serve on a capital punishment case" (People v. Goodridge, 70 Cal. 2d 824, 452 P. 2d 637, 646-7 (1969). Or that a juror did not "believe" or "think" he could give the death penalty under any circumstances. (People v. Washington, 71 Cal. 2d 1061, 458 P. 2d 479 (1969).)

On the other hand, the California Court has affirmed the excusing of jurors who said they "would rather not serve" or "I'm afraid I would [feel compelled to vote for life imprisonment]" or "I don't think I could consider it" or "I feel I couldn't" or "I don't believe I could." People v. Mabry, 71 Cal. 2d 430, 455 P. 2d 759, 767-70 (1969). In another case the court sustained a challenge to jurors who said "I believe that is my feeling" and "I don't think I would in conscience impose the death penalty." People v. Hill, 70 Cal. 2d 678, 452 P. 2d 329, 341-42 (1969). In a third case a juror whose answers shifted from "possibly could" to "could not" was finally excused when he said he answered affirmatively to the proposition that no matter what the case was, he could not, in good conscience, vote for the death penalty. People v. Robles, 71 Cal. 2d 924, 458 P. 2d 67 (1969). These decisions simply cannot be subjected to a simple, reasonable analysis explaining the difference in results.

cise its peremptory challenges to eliminate scrupled jurors who could still return a death penalty verdict. And presumably the prosecution would always choose to exercise its challenges with respect to such jurors. Yet this important question is unanswered by *Witherspoon*.[24]

In short, the Court ought to reconsider or clarify its decision in *Witherspoon* in light of the effect of that decision on actual jury selection, in light of the problems created by retroactive application and in light of the serious problems in interpreting the decision.

B.

The Particular Voir Dire In This Case Was Not Conducted In Violation Of The Witherspoon Decision.

During the *voir dire* in the present case each venireman was asked in substance whether he had any religious or conscientious scruples against the infliction of the

---

24. In the case at bar the State had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under Witherspoon. Since this was a capital case each side had 20 peremptory challenges under the applicable Illinois statute: Ill. Rev. Stat. 1963, Chap. 38, par. 115-4 (e). None of the State's peremptory challenges was exercised against veniremen who were totally opposed to capital punishment. Notwithstanding this fact the State failed to exhaust all of its peremptory challenges at the close of the examination. If defense counsel had elected to question further and had been able to elicit from a few challenged veniremen the response that despite their religious or philosophical principles they might be able to sign a death verdict, the composition of the jury would have been no different in respect to its propensity to invoke the death penalty.

death penalty in the proper case. In the context of the entire *voir dire*, including the trial court's efforts to determine whether the jurors would consider all possible verdicts, it cannot be said that there had been removed from the jury "for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty." *Bumper* v. *North Carolina*, 391 U.S. 543, 545 (1968). Twelve jurors positively asserted that they had such scruples and were excused for cause without motion by the State or objection by petitioner.

The general course of the examination, however, was unlike *Witherspoon* where the trial judge promptly removed all who voiced the slightest disdain for the death penalty. The effort of the trial court to select a fair and impartial jury is reflected in the examination of prospective juror Conner:

> "The Court: Q. Did you say Mr. Conner, that if you determine first, that the defendant is guilty and then you are to determine whether you should render a verdict of death that you couldn't consider that?
>
> A. I said that I was one hundred percent for punishment, but if a man has to take another life to punish him, then I don't feel that I could be justified in taking it.
>
> Q. In other words, you don't believe in capital punishment?
>
> A. If that's what it amounts to.
>
> Q. No, no. I'm asking you. I asked you, did you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?
>
> A. In a proper case, no, I don't have any objections and I could sign a death penalty in a proper case.

The Court: Well, I'm not going to remove him." (R. 145).

Another example is the following examination of prospective juror Nakata:

"Q. Likewise, you can't be a juror unless you, when you're sworn, and you are sworn to respect and observe the law.

A. That's the reason why I would like to give my reasoning right now, before I perjure myself about that personally, because I can't go all the way on capital punishment.

Q. You can't go all the way?

A. No.

Q. Where do you stop?

A. It depends on the kind of crime it is and the evidence presented for it.

Q. Oh, that's all we are asking you to do.

A. Well, it seems to me, from the statements made by the prosecuting attorney, that he is going to ask for the death penalty, so in view of that fact, I think I should disqualify myself.

Q. If he asks for it, it doesn't mean that you have to give it to him.

A. Of course, that's true, too. But at the same time, though, I mean, I wouldn't be applying the law, as he stated it, you see, upon his presentation of the evidence, and all that, so I don't think I would be fair to the court or to the rest of the jurors by my being on the jury.

The Court: Step down, then, if you don't think you can be fair. I'm not going to ask you to try any further. The only question is, we want you to be fair and impartial." (R. 227-229)

It is the State's understanding of the *Witherspoon* doctrine that the exclusion of jurors with scruples against

capital punishment does not necessarily void the infliction of the death penalty. The tenor of the *voir dire* examination here was quite different from that of the *Witherspoon* court. In that case the tone was set early in the *voir dire* when the trial judge said, "Let's get these conscientious objectors out of the way without wasting any time on them." In this case, there was no hint of a desire to be unduly rash in selecting the jury. To the contrary, the mood of the proceedings here indicated a sincere desire to determine the jurors' qualifications. The fact that the questioning became more abbreviated as the examination progressed indicates merely an increase in efficiency, not a sellout to haste.

Furthermore, in the context of the *voir dire* it is clear that the veniremen were cognizant of the import of the question. In Illinois, as in most jurisdictions, the entire venire is present in the courtroom while the indivdual jurors are questioned. The venire is brought into the courtroom and given preliminary instructions concerning the nature of the case and the trial procedure. The veniremen are then sworn as a group. After the colloquy between the trial court and venireman Connor (R. 145) (who was the second venireman examined) no prospective juror could have been in doubt as to what was meant by conscientious or religious scruples against inflicting the death penalty. The trial court made it clear that it was concerned only with persons who would not render the death penalty under any circumstances; and such persons may be excused for cause under *Witherspoon*.

CONCLUSION

For the foregoing reasons, Respondent requests that the judgment of the Supreme Court of Illinois be affirmed.

Respectfully submitted,

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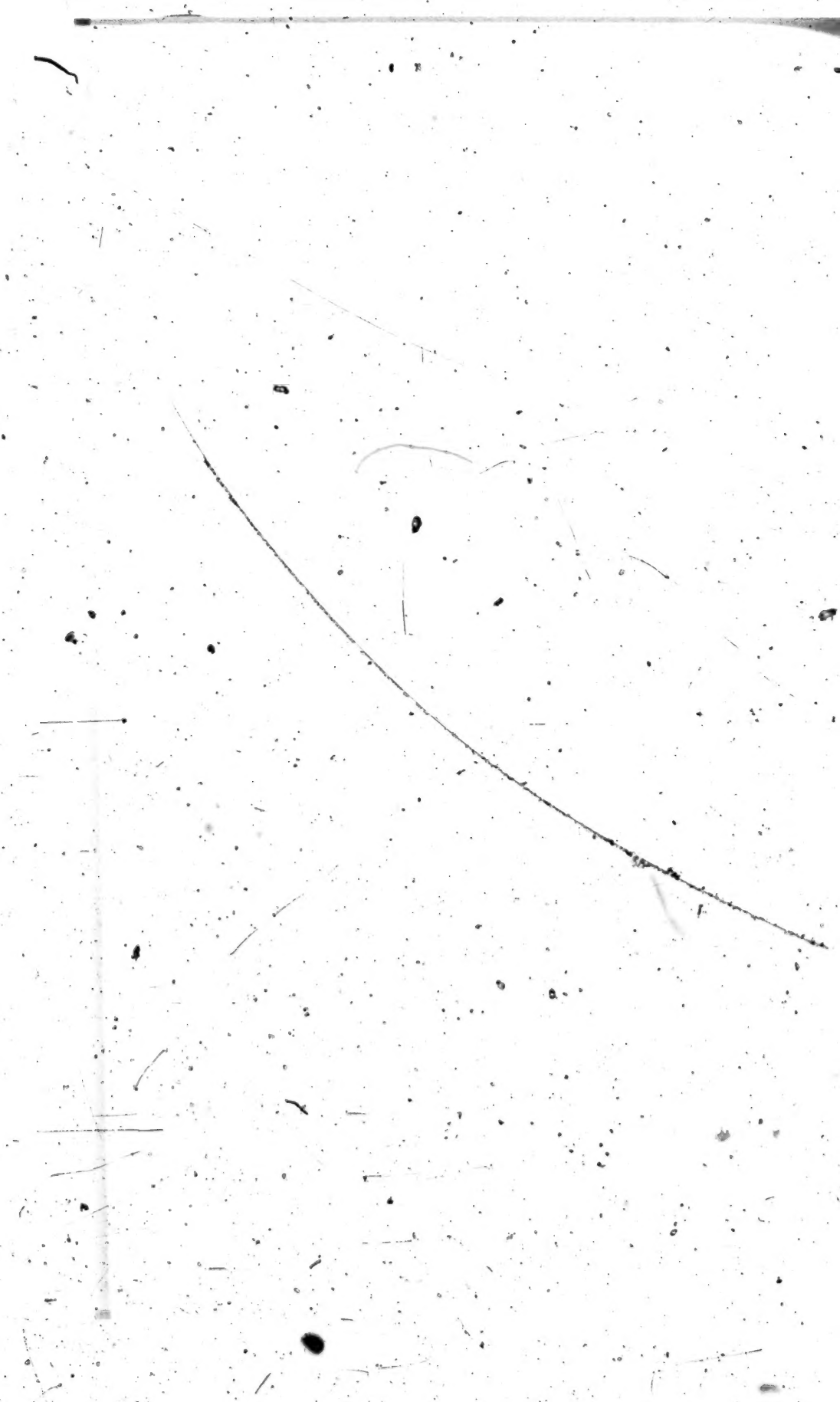

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF FOR PETITIONER

GERALD W. GETTY, Public Defender of Cook County, Illinois,
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REPLY BRIEF FOR PETITIONER

1. NONDISCLOSURE OF EXONERATING EVIDENCE.

The respondent seeks to excuse the nondisclosure of six items of exonerating evidence for three reasons:

1. Suppression must be by the *prosecution* rather than by the police.
2. Disclosure must be *requested.*
3. The evidence suppressed must be *material.*

We will show that all three of these reasons are invalid under the facts and the law.

Respondent argues that the *Brady* v. *Maryland* doctrine is limited to suppression by the *prosecution*. (Br. 9.)

Of course that is the majority view of the court below. (App. 8a.) The better view is expressed by the dissent of Mr. Justice Schaefer (App. 18a-19a) that nondisclosure by the police is equally as harmful and as much a denial of due process to the accused as nondisclosure by the prosecution. *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842.

Resolution of that difference of opinion in the case at bar is unnecessary because the prosecution knew about at least two of the six items of exonerating evidence:

(1) The prosecutors were present (A. 45-47) when the Lansing Police actively encouraged Virgle Sanders to falsely identify petitioner Moore as the man known as "Slick" although he did *not* look like "Slick." (A. 294-295.)

(2) The prosecutors knew that William Leon Thompson who could identify "Slick" had been shown a photograph of petitioner Moore and had not identified him as "Slick." Lieutenant Turbin told the prosecutors about that event. (A. 266, 267.)

The prosecution knew and yet did not disclose either of those two events to trial counsel. That is a clear showing of *prosecution* failure to disclose favorable evidence to the accused.

Moreover, Lieutenant Robert Turbin of the Lansing Police Department sat at the counsel table with the prose-

cutors throughout the trial. (A. 11, 316-317.) That was the same Lieutenant Turbin who had been assigned to look for James E. "Slick" Watts. (A. 346.) Thus, not only was the Lansing Police and the prosecution legally inseparable (*Barbee* v. *Warden*) but factually inseparable. They were one and the same.

Respondent argues that *Brady* v. *Maryland* requires a *request*. (Br. 9.)

Exonerating evidence not reduced to writing cannot be constitutionally concealed simply because there was no request for it. "If the defense does not know of the existence of the evidence, it may not be able to request its production." *Giles* v. *Maryland*, 386 U.S. 66, 102, concurring opinion. Four of the six items of exonerating evidence in the instant case were not even reduced to writing. (A. 254-255, 266, 294-295, 346.)

In the case at bar there was a more formal request than in *Brady* v. *Maryland*—a written motion for any and all statements made to the Lansing Police. (A. 5.)

Respondent argues that the prosecutor displayed his entire file to the defense. (Br. 9.)

Defense counsel Horka testified at the post-conviction hearing that prosecutor Fleming obstreperously offered his file but that he was not shown the file. (A. 331.) Prosecutor Fleming testified that he showed Horka his entire file. (A. 319.) But he did not recall whether Virgle Sanders' statement was in his file (A. 321) or the diagram showing where Henley Powell was seated. (A. 322-324.)

Assume, however, that Fleming did give Horka the file. Shouldn't Horka be able to rely upon the inarticu-

lated representation that everything material or relevant to the prosecution of the case is contained in that file? Fleming did not remember whether two documents were contained in that file. And obviously, the file did *not* contain the other four items of exonerating evidence which were not even recorded. (A. 254-255, 346, 266, 294-295.) Cf. *Jackson* v. *Wainwright,* 390 F. 2d 288, 298.

> Respondent argues that the undisclosed six items of exonerating evidence was not *material.* (Br. 10-17.)

State concealment of the fact that another man voluntarily confessed to a murder for which the accused has been sentenced to death is material.

Five of the six items of exonerating evidence irresistibly point to the conclusion that James E. "Slick" Watts and not the petitioner Moore bragged to Virgle Sanders that he shot the bartender in Lansing. But neither the identity nor even the existence of James E. "Slick" Watts was disclosed to the defense at the trial. That evidence coupled with the unimpeached work-record alibi evidence might have persuaded the jury of petitioner's innocence.

Respondent now tries to minimize the importance of the undisclosed exonerating evidence:

> Respondent argues that it is unimportant that Virgle Sanders told the Lansing Police that he first met "Slick" about six months before the murder; that the six month period was a "rough guess" and that "it could have been two, three months to nine months. I don't know." (Br. 11-12.)

The record shows that Sanders knew definitely that his first meeting with "Slick" was before Christmas of '61. That is a fact—a pinned-down fact:

Q. You are definite that it was before Christmas of '61 that you saw him in Wanda and Dell's?
A. Oh, yes. (A. 295.)

Respondent misstated an important fact which could be misleading:

> 3. Soon after Virgle Sanders supplied the name "Slick" to the Lansing Police, a suspect named James E. "Slick" Watts was apprehended and photographed. (Br. 8.)

The photograph from the Lansing Police file (A. 335) is obviously *not* a police photograph. (A. 275.)

The police mug shots of "Slick" Watts from the Chicago Police and the House of Correction were obtained by present counsel *after* the trial, and were introduced at the post-conviction hearing. (A. 276, 277.)

"Slick" Watts had never been arrested by the Lansing Police. Chief Braschler testified that the nickname "Slick" was supplied by Virgle Sanders; that he then "assigned Lt. Turbin to look for "Slick" Watts. We had "Slick" Watts' *name* during all this time." (A. 346, emphasis supplied.)

Mr. Justice Schaefer said in his dissenting opinion, App. 16a-17a:

> The defendant's conviction rests entirely upon identification testimony. The facts developed at the post-conviction hearing seriously impeached, if indeed they did not destroy, Sanders' trial testimony. Had those facts, and the identifications of "Slick" Watts by Thompson and Jones, been available at the trial, the jury may well have been unwilling to act upon the identifications of Patricia Hill and Henley Powell. Far more is involved in this case, in my opinion, than "the following up of useless leads and discussions

with immaterial witnesses." Certainly if Sanders' identification was material, the F.B.I. report and the testimony of the other witnesses which destroyed that identification were also material. Consequently, I believe that the State's nondisclosure denied the defendant the fundamental fairness guaranteed by the constitution. *Brady* v. *Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194; see *United States* v. *Wilkins* (2d Cir. 1964), 326 F. 2d 135.

2. THE SIXTEEN GAUGE SHOTGUN.

The Attorney General of Illinois offers three erroneous arguments in support of the introduction of a .16 gauge shotgun in a case in which the deceased was shot to death with a .12 gauge shotgun.

First, the respondent argues that the .16 gauge shotgun was found in the possession or control of the petitioner. (Br. 18)

The record refutes that conclusion. It did not belong to the petitioner and was never in his possession or control. It was recovered from a 1957 Ford (A. 58, 66-71) owned by a man named Barbee. (A. 68) The sawed-off barrel was recovered from Barbee's home. (A. 77) Mr. Justice Schaefer's conclusion that the .16 gauge shotgun was never in the possession or control of the petitioner (App. 14a) is the correct interpretation of the record.

Second, the respondent argues (Br. 20) as the majority held (App. 4a) that the .16 gauge shotgun was suitable for the commission of the murder of a man who was shot to death with a .12 gauge shotgun. That conclusion is simply wrong, as Mr. Justice Schaefer pointed out. (App. 14a) A twelve-gauge shotgun is larger than a sixteen-gauge shotgun. (A. 80) And that is *not* a legal argument. It is

based upon the immutable physical laws of the universe and the exact science of measurements. You can't get a twelve-gauge shell into the chamber of a sixteen-gauge shotgun.

Third, the respondent argues that since there was no conclusive proof what gauge shotgun was used to execute the deceased (Br. 19), there is a possibility that the .16 gauge shotgun could have been the murder weapon. (Br. 21, 22) That argument goes beyond the majority opinion which held that there was no clear evidence of the weapon *actually used* in this homicide. (App. 4a) The majority's observation is immaterial. The respondent's argument is desperate. The record shows that the prosecutor who tried the case filed a bill of particulars in which he stated that the murder weapon was a twelve (12) gauge shotgun. (A. 2) He stipulated that if Sergeant F. Benz of the Chicago Scientific Crime Detection Laboratory were called to testify, he would state his opinion that the shotgun shell waddings that had been removed from the chest of the deceased came from a .12 gauge shotgun. (A. 139) The prosecutor admitted to the trial judge that the .16 gauge sawed-off shotgun was not the weapon that killed the deceased (A. 138) and also admitted that to the jury. (A. 200, 202, 204-205)

The respondent's present argument questions the integrity and expertise of the police scientist, the theory of the prosecution, and seeks affirmance on an entirely different approach totally unsupported by anything in the record.

A .16 gauge shotgun did *not* kill the deceased. It is also clear in the record that the prosecutor used the .16 gauge shotgun to denounce the petitioner as a bad man generally. (A. 199-201, 204-206)

Since the .16 gauge shotgun was in no way connected with the offense or the accused, it cannot even qualify as propensity evidence. *Spencer* v. *Texas,* 385 U.S. 554, 572-575, dissenting opinion, and cases cited therein. The respondent recognizes the continued vitality of that principle of law. (Br. 21) Thus, the instant case is *a fortiori.*

3. JURY SELECTED IN VIOLATION OF WITHERSPOON.

Point A of the Attorney General's brief is raised for the first time in the case at bar. However, the same argument, almost word for word, was made in the Illinois Attorney General's petition for rehearing in *Speck* v. *Illinois,* ..... U.S. ....., ... L. Ed. 2d ....., which this Court denied on ....., 1971.

Surely once is enough to apply artificial respiration to theories that became terminal in *Witherspoon* itself.

Point B of the respondent's brief is devoted to an analysis of the questioning of two prospective jurors other than the eight who were removed in violation of *Witherspoon* standards.

The State attempts to create the illusion of compliance with *Witherspoon* by ignoring the eight prospective jurors who were removed in violation of *Witherspoon.* The questioning of two of the many prospective jurors, Conners and Nakata, presented in the State's brief (Br. 35) is hardly typical. The prospective jurors excused on the scruples questions were:

Louis Lorens (R. 152)

"I do not believe in capital punishment"

The Court: "Well, step down."

Katherine Kristoch (R. 212)

"I do not believe in capital punishment"

The Court: "Step down, please."

Marian Peterson (R. 250)

"Yes, I have a very strong conviction against capital punishment."

The Court: "Step down, please."

Nebraska Petty (R. 252)

"I do." (scruples question)

The Court: "Step down."

Jacqueline Threatt (R. 209)

"I feel very strongly against capital punishment."

The Court: "Step down, please."

Mary Gorski (R. 252)

"Yes, I do, your Honor." (scruples question)

The Court: "All right, step down."

Anna Hohnwald (R. 366)

"Yes, I do." (scruples question)

The Court: "Step down, please."

Esther Byrne (R. 122)

"I do not believe in capital punishment . . . No, I don't definitely not."

The Court: "Very well, that's your prerogative. You're excused for cause."

Moreover, the Illinois Supreme Court in affirming relied upon its own decision in *People* v. *Speck*, 41 Ill. 2d 177. The Illinois Court specifically stated: "In . . . Speck . . . we held that the exclusion of jurors with scruples against the death penalty did not necessarily void the infliction of the death

penalty." Your Honors vacated the Speck death penalty. *Speck* v. *Illinois*, ... U.S. ....., 29 L. Ed. 2d 855, 856.

There is a suggestion in Footnote 24, (S.B. 34) that the prosecution had saved enough peremptory challenges to eliminate the eight prospective jurors. This Court also rejected this same argument in *Speck* v. *Illinois*. Furthermore, the record reveals that the prosecution had only four challenges remaining (R. 146, 162, 242, 242, 242, 269, 277, 281, 303, 322, 322, 329, 329, 342, 346, 350—16 peremptory challenges used out of a total of 20.) How the prosecution could peremptorily challenge 8 jurors with only 4 challenges is an unexplained mystery.

CONCLUSION.

Petitioner prays that the judgment of the court below be reversed.

Respectfully submitted,

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January 13, 1972

FILED
JUL 23
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

No. 69-5001

Lyman A. Moore, Petitioner,
v.
State of Illinois.

On Writ of Certiorari to the Supreme Court of Illinois.

PETITION FOR REHEARING

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No. 69-5001

Lyman A. Moore, Petitioner,
v.
State of Illinois.

On Writ of Certiorari to the Supreme Court of Illinois.

PETITION FOR REHEARING

Petitioner Lyman A. Moore respectfully prays for rehearing.

The affirmance of petitioner's conviction turns upon an interpretation of the following question and answer at the post-conviction hearing:

> "Q. And did you tell me and also later on, did you tell the policeman from the State's Attorney's Office that if you had known that this fellow, Lyman Moore, was in a Federal Penitentiary until March 4, 1962, you would definitely not have identified him as being Slick that you knew?

"A. If he's in jail, it would have been impossible to be the same man." (Typed post-conviction transcript 132-133, A. 296.)

The fact that prosecution witness Sanders misidentified petitioner Moore is conceded. The 5 to 4 split occurs when it comes to the meaning of that misidentification.

The majority holds that "the mistake was as to the identification of Moore as 'Slick', not as to the presence of Moore at the Ponderosa Tap on April 27." (Op. 9)

The minority holds that when Sanders was confronted with the fact that petitioner was in a federal prison at the time Sanders met the man known to him as "Slick," he "indicated that it was impossible that petitioner was the man with whom he had spoken in the Ponderosa tavern." (Dissent 5)

I.

As both opinions show, it is now clear that petitioner is certainly not "Slick," although the jury that convicted him obviously believed that he was. Sanders tried to prevent the misidentification before testifying by pointing out that "Slick" was 30 to 40 pounds heavier than petitioner Moore (A. 294) but was dissuaded from doing so by the callous comment in the presence of the prosecutors, "Well, you know how those jailhouse beans are." (A. 295)

At the post-conviction hearing, during cross examination by the Assistant State's Attorney, Sanders made it crystal-clear that the confessor in the Ponderosa Tap on April 27 was "Slick" and not petitioner Moore. *After* Sanders realized that petitioner and Slick could not have been the same man (A. 296) he persisted in referring to the man in the Ponderosa as "Slick," not petitioner:

"I went in the Ponderosa Bar there for a beer. And I saw two men in there. They were talking to the bartender. Then the guy called my name—the *guy I knew as 'Slick' called my name; he was one of the two guys.*" (A. 300, emphasis supplied.)

• • •

"Q. You didn't say you gave anybody a ride, but that you saw this fellow in the Ponderosa?

A. I saw the *guy I knew as 'Slick'* in the Ponderosa that day, that's right." (A. 304, emphasis supplied.)

II.

Virgle Sanders is the *only* prosecution witness that testified he knew the petitioner. The jury sat and watched and listened to Sanders identify petitioner Moore as a man he *knew,* a man he had seen a number of times, a man he knew only by the nickname "Slick" (A. 42), a man who on April 27, 1962, had heartlessly bragged and voluntarily confessed, "I shot a bartender in Lansing." (A. 47)

In a case that hinges on identification, the fact that the identifying witness knew the accused and had seen the accused on a number of previous occasions (A. 42) lends probative force to his testimony. That is why petitioner says that Sanders is the key prosecution witness. The jury did not hear Sanders utter the words, "If he's in jail, it would have been impossible to be the same man." (A. 296) The jury should have been afforded an opportunity to interpret what he meant.

The majority says the "mistake was as to the identification of Moore as 'Slick,' not as to the presence of Moore at the Ponderosa Tap on April 27." (Op. 9) But, the record reveals that Sanders was in the Ponderosa

as a customer; not as a bartender. (A. 300) The bragging confessor was well enough acquainted with Sanders to know his first name and the fact that Sanders worked part time as a bartender. *"Virgle,* it's open season on *bartenders."* (A. 300, 351, emphasis supplied.) "Slick" was a prior acquaintance of Sanders. Moore was not. Logic dictates that the braggart confessor in the Ponderosa was "Slick;" not petitioner Moore.

The Court apparently believed that "The reason that Sanders could remember the *first time* that he had met 'Slick' was that 'Slick' had been involved in a scuffle with one William Thompson." (Dissent 5, emphasis supplied.) But prior to the scuffle Sanders had seen "Slick" in Wanda and Del's Tavern on numerous occasions—he did not remember how many (A. 42) but that is where he saw him the most and the scuffle was on one of those occasions. (A. 293, 298) That inaccuracy might have caused the Court to overlook the fact that Sanders and "Slick" were well enough acquainted for "Slick" to know Sanders' first name and the fact that he worked part time as a bartender. Only an established acquaintance could have said, *"Virgle,* it's open season on *bartenders."* (A. 300, 351, emphasis supplied.) And that oversight may be why the opinion attaches so little significance to Sanders' admission on post-conviction that "If he's in jail, it would have been impossible to be the same man."

The majority says that "the elusive 'Slick' was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore's presence at the Ponderosa were found." (Op. 9) But, the record reveals that the search for "Slick" did not *end* when witnesses to the Ponderosa incident were found; it *began* then. Lansing

Police Chief Braschler testified in the post-conviction hearing on January 12, 1967, that, "The name of 'Slick' came from Sanders." (A. 346) And far from abandoning "Slick" as an early lead, it was used at the trial. The jury was told that Moore was "Slick." (A. 42)

Indeed, during final arguments, the prosecutors told the jury that petitioner Moore was "Slick" (A. 162) and that Virgle Sanders had known him before (A. 203) and that petitioner knew Sanders was a bartender. (A. 205)

III.

The majority holds that Sanders' misidentification of Moore as "Slick" did not "destroy" the "positive" identifications of Hill, Powell, Joyce, and Fair. (Op. 12) Petitioner respectfully submits that the standard should be whether his misidentification and the evidence concealed that could have established his mistake at trial "may have had an effect on the outcome of the case."

But if those other witnesses were not "destroyed," neither can they be said to inspire mammoth confidence.

Patricia Hill

Over six months elapsed between the crime and the "identification" of petitioner Moore by Patricia Hill on November 1, 1962. (A. 144) She was the only one of 7 persons who had been summoned by the Lansing police to view that lineup that identified petitioner Moore. (A. 116) Patricia Hill had viewed a lineup on the night before in which petitioner Moore was present. She did not identify him at that time. (A. 145) Few things could be more suggestive than that kind of procedure. Petitioner

was precluded from developing the point on cross examination. (A. 31)

Henley Powell

Henley Powell "identified" petitioner Moore 25 months after the shooting. He was never invited to view the petitioner Moore until the day he testified in court. (A. 143) Petitioner was specifically precluded from establishing that fact before the jury on cross examination. (A. 37, 143) There is a statement in the State's Attorney's file obtained on January 10, 1967, in which Powell said (p. 3) that when he first saw petitioner in court "he was thinner, his cheek bones were protruding more than when he shot Bernie." (Cf. *Giles* v. *Maryland*, 386 U.S. 66, 82 n. 1, concurring opinion.)

Robert Fair

Robert Fair's testimony was so innocuous that it was considered irrelevant for purposes of the post-conviction hearing. At the trial, he testified only that petitioner "looks like one of the men" in the Ponderosa Tap. (A. 51) The man called "Slick" was a friend of Virgle Sanders, not Fair. Fair had never seen "Slick" before. (A. 53)

William Joyce

William Joyce identified petitioner Moore as the man who had a conversation with Virgle Sanders, but he paid no attention to it. (A. 39) At the time of the post-conviction hearing William Joyce was ill. The State stipulated to what he would testify to if available, but objected to materiality. (A. 348) It is as follows:

> That if William Joyce were called to testify he would testify in response to my cross examination

and this can be verified from the files that the Officer Don Moriarty of the State's Attorney's Police has from an interview of Joyce recently and Joyce will testify as follows, that there was a fellow in the Ponderosa Tap on the afternoon of April 27, 1962, and that he had a crew cut and he was dirty and he was boisterous and he was using foul language and that he had a Southern accent, and that he went to Bob Fair, the owner of the Ponderosa at the time, and he said to him, "Look, get this hill-billy the hell out of here or there is going to be trouble, he wants a ride to Harvey." Whereupon, Bill Fair took the man to Harvey and the next time that he saw anybody in connection with the incident, he saw one Lyman Moore and when he first laid eyes on him he said, "He sure looks different." He says when he saw him in the trial he looked like a minister's son.

One other thing, that he never in his lifetime has heard Lyman Moore talk, so he doesn't know what kind of an accent this Lyman Moore has.

The jury did not hear that when he first saw petitioner at trial he said "He sure looks different." (A. 349)

Petitioner respectfully submits that the issue is not whether the State's evidence has been "destroyed", but whether the concealed information might reasonably have affected the outcome of the original trial. To suggest that the prosecution may withhold any evidence which does not destroy the entirety of its case, is to render *Brady* completely meaningless.

Any competent trial lawyer, armed with the material then secreted, could have won an acquittal for Moore. As in almost all cases of acquittal, the remaining State witnesses would not have been "destroyed"; it would

simply have been impossible to believe them beyond a reasonable doubt in the light of those facts. Their original observational opportunities, added to the lengthy time gap between observation and identification, renders them weak targets for any defense lawyer armed with the inconsistent facts now available.

IV.

A criminal trial has been referred to as a search for the truth. *Williams* v. *Florida*, 399 U.S. 78, at 82. And Due Process of Law, whatever else it means, ought to be considered a double-track railroad. If Sanders' identification of petitioner Moore as "Slick" was material at his trial, then the concession that Sanders was mistaken in identifying petitioner Moore as "Slick" (Op. 9, 10) ought to be presented to the jury on a new trial.

V.

This Petition for Rehearing should be granted, limited to the grounds above urged, and set down for reargument on the summary calendar.

Respectfully submitted,

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Certificate Of Counsel

I certify that this petition is presented in good faith and not for delay.

/s/ James J. Doherty

July 22, 1972.

LE COPY

SUPREME COURT, U. S.
FILED
JUL 25 1972
MICHAEL RODAK, JR., CLERK

No. 69-5001

In the

Supreme Court of the United States

OCTOBER TERM, 1971

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Brief in Support of the

PETITION FOR REHEARING BY THE AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AND THE ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT, AS AMICUS CURIAE

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LYMAN A. MOORE,

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR REHEARING BY THE AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AND THE ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT, AS AMICUS CURIAE

Pursuant to Rule 58(1) of the Revised Rules of the Supreme Court of the United States, the American Civil Liberties Union, Illinois Division, and the Illinois Committee for the Abolition of Capital Punishment, as amicus curiae, respectfully petition for rehearing of the judgment and decision by the majority of this Court, dated June 29, 1972, and offer the following arguments in support of this Petition:

Rehearing Should be Granted on the Issues of Suppression of Evidence and Use of False Evidence

The decision of this Court applying the principles of *Brady* v. *Maryland*, 373 U.S. 830 and *Napue* v. *Illinois*, 360 U.S. 264, to the conviction of Lyman Moore stands in stark contrast to the application of those same principles to the facts presented in *Brady* and *Napue*, as well as *Miller* v. *Pate*, 386 U.S. 1; *Alcorta* v. *Texas*, 355 U.S. 28; *Pyle* v. *Kansas*, 317 U.S. 213; *Mooney* v. *Holohan*, 294 U.S. 103, and most recently in the case of *Giglio* v. *United States*, ... U.S. ..... The majority's disregard of the importance of the credibility of Virgle Sanders' testimony and the other evidence implicating "Slick" in the crime has lamentably restricted the salutary impact of its prior decisions upon full and fair presentation of the facts to the jury and has permitted a man to be convicted of a capital offense on the basis of deplorably dubious evidence.

The Court's decision in the present case turns upon neither the favorability of the evidence to the defense nor upon the issue of suppression of that evidence. Rather, the majority of this Court holds that the evidence in question "was not material to the issue of guilt" in light of the various identifications of Moore as the assailant and the man present at the Ponderosa Tap on April 27. In so doing, the majority seems to have considered only the evidence probative of guilt and to have drawn all inferences favorable to the Prosecution. This approach may be justified where the sufficiency of the evidence is questioned, but it cannot be deemed consistent with the standard applied where evidence has been withheld.

A finding of materiality of the evidence is required under *Brady, supra,* at 87. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." *Napue* v. *Illinois, supra,* at 271. *Giglio* v. *United States,* ..... U.S., ..., ...

Even setting aside the diagram which tended to contradict Powell's identification of Moore as the slayer, the evidence relating to "Slick" and particularly the pretrial statement of Virgle Sanders clearly weakened the Prosecution's case while simultaneously bolstering the plausibility of Moore's defenses. A jury might well have disbelieved Sanders' identification of Moore as the man with whom he spoke in the Ponderosa Tap. Since Sanders was the only one of the witnesses testifying about that occurrence who claimed to have had a prior acquaintance with "Slick," the identifications of the other witnesses could also have been shaken. Certainly, the impairment of Sanders' highly damaging testimony could reasonably have caused the jury to discount the value of the testimony of Fair and Boyce. This would seem particularly true when coupled with the other evidence regarding the identity of "Slick."

The majority seems entirely to have overlooked or dismissed the defects in the prosecution's evidence regarding the eye-witness identification by Patricia Hill and Henly Powell, as well as the uncontradicted and unimpeached alibi testimony offered by the headwaiter and the general manager of the club which employed Lyman Moore. This evidence was sufficiently persuasive to cause Justice Schaefer of the Illinois Supreme Court to conclude that there was insufficient evidence to support the conviction even apart from the evidence which was withheld. 42 Ill.2d at 85-86.

The majority's decision has deprived Petitioner Moore of the opportunity to present his full defense to an impartial jury. Permitting his conviction for murder to stand upon such hotly disputed facts perils not only the principles of fair disclosure but also the standards by which reversible error is determined. The majority's decision departs from this Court's past reluctance to resolve such factual disputes as its own and should be reconsidered.

The Court Should Grant Rehearing on the Admission of the Shotgun into Evidence as Proof of the Defendant's Guilt

The decisions of this Court upholding the admission of the 16-gauge shotgun into evidence against Petitioner Moore constitute a disturbing deviation from the principles of fair play upon which the Due Process Clause of the Constitution is predicated and should be withdrawn and reheard.

If the majority is correct that the "shotgun issue" was not properly presented in the state courts and was therefore not "properly presented for review," the appropriate disposition of that issue would be dismissal of certiorari on that question as improvidently granted. *Michel* v. *State of Louisiana,* 250 U.S. 91, 101-102; *Nelson* v. *Los Angeles County,* 362 U.S. 1, 9; *Wilson* v. *Cook,* 327 U.S. 474, 483-484. Having reached the question, however, this Court should have held that the admission of the shotgun into evidence against Petitioner Lyman Moore deprived him of his right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment.

By both ballistics tests and the State's pretrial stipulation, the 16-gauge shotgun admitted into evidence at Lyman Moore's trial was not, and could not have been, the murder weapon. In clear contradiction to these facts, the trial court admitted the weapon because of its apparent connection with commission of the murder, and the Illinois Supreme Court upheld the ruling because the shotgun was "suitable for the commission of the crime charged." 42 Ill.2d at 78, 246 N.E.2d at 302-303. Even before this Court, the State still confuses the issues by asserting the possibility that the 16-gauge shotgun was, in fact, the murder weapon (Respondent's Brief at 20-21), and that confusion is itself reflected in the majority's opinion:

> There is substantial other evidence in the record that a shotgun was used to kill Zitek, and that he suffered the wounds one would expect from a shotgun fired at close range. The testimony as to the murder itself, with all the details as to the shotgun wounds, is such that we cannot say that the presentation of the shotgun was so irrelevant or so inflammatory that Moore was denied a fair trial. U.S. at .....

The obvious inference from those facts is that the 16-gauge shotgun found in the constructive possession of Lyman Moore was, or could well have been, the murder weapon. The obvious inference from the confusion of the various courts considering the question is that the jury was, or could well have been, confused into thinking that the 16-gauge shotgun was, or could have been, the murder weapon. Principles of fairness and the administration of justice demand that this blatant inconsistency be remedied. Cf. *Miller* v. *Pate*, 386 U.S. 1.

The confusion and prejudice resulting from admission of the shotgun cannot be dissected from the Prosecution's use of that evidence during the course of trial. The Prosecution stressed the 16-gauge shotgun as proof of the dastardly character and homicidal predisposition of defendant Moore. This conduct was itself incompatible with accepted rules of evidence observed not only by this Court but by almost every court following the common law tradition, including Illinois. Cf. *Boyd* v. *United States,* 142 U.S. 450, 458; *Greer* v. *United States,* 245 U.S. 559; *Michelson* v. *United States,* 355 U.S. 469, 475-476; *Illinois* v. *Polenick,* 407 Ill. 337, 95 N.E.2d 414 (1951); *Illinois* v. *Stark,* 324 Ill. 289, 155 N.E. 271 (1927). See also, 1 Wigmore, *Evidence,* §§ 57, 193 (3d ed. 1940); 1 Wharton, *Criminal Evidence,* § 330 (11th ed. 1935).

It is no answer to this twofold error and double-prejudice that defense counsel at trial explained to the jury that the two weapons were not identical. Explanations by defense counsel could hardly be expected to correct the inflammatory and erroneous impression left in the wake of the confusion surrounding the shotgun and the prejudicial use made of that evidence by the State, both tacitly approved by the trial judge. Where, as here, elemental rules of fairness have been disregarded, not only by the Prosecution but by the very Courts of the State, Due Process cannot be satisfied by leaving the defense to its own devices.

CONCLUSION

For the reasons set forth above, the Court should withdraw its decision and grant rehearing in this case.

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(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MOORE *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 69–5001. Argued January 18, 1972—Decided June 29, 1972

Moore, who was convicted of murder and sentenced to death for the shotgun slaying of a bartender at a Lansing, Illinois, tavern, claimed that he was denied a fair trial and due process because the State failed to make pretrial disclosure of several items of evidence helpful to the defense, failed to correct false testimony of one Henley Powell, and succeeded in introducing into evidence a shotgun that was not the murder weapon. The evidence not disclosed consisted of a pretrial statement by Virgle Sanders that Moore was known to him as "Slick" and that he had first met "Slick" some six months before the killing, and documents and testimony that established that Moore was not the man known to others in the area as "Slick." Powell testified that he observed the killing, and the State did not introduce into evidence a diagram that, Moore claims, illustrates that Powell did not see the shooting. The State Supreme Court rejected the claim that evidence had been suppressed and false evidence had been left uncorrected, and held that the shotgun was properly admitted into evidence as a weapon in Moore's possession when he was arrested and suitable for commission of the crime charged. Moore also attacks the imposition of the death penalty for noncompliance with the standards of *Witherspoon* v. *Illinois*, 391 U. S. 510. *Held:*

1. The evidentiary items (other than the diagram) on which Moore bases his suppression claim relate to Sanders' misidentification of Moore as "Slick" and not to the identification, by Sanders and others, of Moore as the person who made the incriminating statements in the Ponderosa Tap. These evidentiary items are not material under the standard of *Brady* v. *Maryland*, 373 U. S. 830. The diagram does not support Moore's contention that the State knowingly permitted false testimony to remain uncorrected, in violation of *Napue* v. *Illinois*, 360 U. S. 264, since the diagram

does not show that it was impossible for Powell to see the shooting. Pp. 8–12.

2. Moore's due process claim as to the shotgun was not previously raised and therefore is not properly before this Court, and in any event the introduction of the shotgun does not constitute federally reversible error. Pp. 12–13.

3. The sentence of death may not be imposed on Moore. *Furman* v. *Georgia*, *post*, p. —. P. 13.

42 Ill. 2d 73, 246 N. E. 2d 299, reversed in part and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS, STEWART, and POWELL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 69-5001

Lyman A. Moore, Petitioner, v. State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[June 29, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This state murder case, with the death penalty imposed by a jury, comes here from the Supreme Court of Illinois. The grant of certiorari, 403 U. S. 953 (1971), was limited to three of four questions presented by the petition. These concern the nondisclosure to the defense of allegedly exculpatory evidence possessed by the prosecution or the police; the admission into evidence of a shotgun that was not the murder weapon; and the rejection of eight veniremen who had voiced general objections to capital punishment. The first and third issues respectively focus on the application of *Brady* v. *Maryland*, 373 U. S. 83 (1963), and *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968).

I

Petitioner Lyman A. Moore was convicted in 1964 of the first degree murder of Bernard Zitek. Moore's appeal to the Supreme Court of Illinois was held in abeyance while he petitioned the trial court for post-conviction relief. After a hearing on January 1967, that petition was denied. Moore's appeal from the denial was consolidated with his appeal from the conviction and sentence. With one justice dissenting and another not

participating, the Illinois court affirmed the judgments. 42 Ill. 2d 73, 246 N. E. 2d 299 (1969).

II

The homicide was committed on April 25, 1962. The facts are important:

A. The victim, Zitek, operated a bar-restaurant in the village of Lansing, southeast of Chicago. Patricia Hill was a waitress there. Donald O'Brien, Charles A. Mayer, and Henley Powell were customers.

Another bar called the Ponderosa Tap was located in Dolton, also southeast of Chicago. It was owned by Robert Fair. William Joyce was the bartender. One of Fair's customers was Virgle Sanders.

A third bar known as Wanda and Del's was in Chicago. Delbert Jones was the operator. William Leon Thompson was a patron.

The Westmoreland Country Club was in Wilmette, about 50 miles north of Lansing. The manager there was Herbert Anderson.

B. On the evening of April 25 Zitek was tending bar at his place in Lansing. Shortly before 10 p. m. two men, one with a moustache, entered and ordered beer. Zitek admonished the pair several times for using profane language. They continued in their profanity and, shortly, Zitek ejected them. About an hour later a man carrying a shotgun entered. He laid the weapon on the bar and shot and killed Zitek. The gunman ran out, pursued by patrons, and escaped in an automobile.

C. At the trial waitress Hill positively identified Moore as one of the two men ejected from the bar and as the one who returned and killed Zitek. She testified that she had a clear and close view from her working area at the bar and that she observed Zitek's ejection of the two men and the shotgun killing an hour later.

D. A second in-court identification of Moore as the man who killed Zitek was made by the customer Powell. Powell, who at the time was playing pinochle with others, testified that he observed Moore enter the bar with a shotgun and shoot Zitek; that after the shooting he pursued Moore; and that outside the bar Moore stopped momentarily, turned, and shouted, "Don't come any further or I'll shoot you, too."

E. Sanders testified that on April 27, two days after the murder, he was in the Ponderosa Tap and that a customer there, whom Sanders identified as "Slick," remarked to Sanders that it was "open season on bartenders" and that he had shot one in Lansing. At the trial Sanders identified Moore as the man who was in the Ponderosa Tap on April 27. Moore was with another man who had a moustache. The two asked for a ride to Harvey, Illinois. The owner, Fair, agreed to give them the ride.

F. Fair testified that Moore was one of the two men who requested and were given the ride; that during the journey one of them was referred to as "Barbee"; and that one said "something like, 'Well, if we hadn't had that trouble with the bartender in Lansing, we'd have been all right.'"

G. The Ponderosa bartender, Joyce, testified that Sanders and Fair were in that tavern on April 27; that Moore was there at the same time; and that he arranged with Fair for Fair to give Moore and his companion a ride.

It is thus apparent that there were positive in-court identifications of Moore as the slayer by the waitress Hill and by the customer Powell, and that there were in-court identifications of Moore as having been present at the bar in Dolton two days later by Sanders, by Fair, and by Joyce.

H. Six months after the slaying, in the early morning hours of October 31, 1962, a Chicago police officer was shot at from a 1957 Ford automobile. Two men fled the scene. The police "staked out" the car, and several hours later Moore and a moustached man, later identified as Jerry Barbee, were arrested when they approached and entered the vehicle. The automobile proved to be owned by Barbee. A fully-loaded sawed-off 16-gauge shotgun was in the car.[1] The shotgun was introduced in evidence at Moore's trial.[2] The State conceded that the gun so introduced was not the murder weapon, and that the State's ballistics technician, if called, would testify that the waddings taken from Zitek's body came, in his opinion, from a 12-gauge shotgun shell.

I. The defense called manager Anderson of the Westmoreland Country Club as a witness. He testified that Moore had been hired as a waiter there on April 24 (the day before the murder); that the club records indicated there was a special party at the club on the evening of April 25; and that Moore was paid for working until sometime between 10 p. m. and midnight. The club's bartender testified to the same effect. Each of these witnesses nevertheless admitted that he could not remember seeing Moore at the club that night, but said that he would have known if he had been absent for any substantial period of time. The club records also indicated that Moore worked at the club the afternoon of April 27 when, according to the testimony of

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[1] This early morning incident was recounted in an earlier trial of Moore and Barbee for an armed robbery at Harvey, Illinois, on July 27, 1962. *People* v. *Illinois*, 35 Ill. 2d 399, 401–402, 220 N. E. 2d 443, 444–445 (1966), cert. denied, 389 U. S. 861 (1967).

[2] A revolver found at Moore's feet at the time of his arrest and a shoulder holster then on his person were ruled inadmissible.

Sanders, Fair, and Joyce, Moore was at the Ponderosa Tap in Dolton.[3]

H. O'Brien, the customer at Zitek's, testified for the defense that he observed Zitek eject two men the evening of the 25th, and that Moore was not one of them. Although he was in the restaurant at the time of the homicide, he did not see the person who shot Zitek. A police officer testified that in his opinion O'Brien was drunk at the time.

III

Prior to the trial the defense moved for disclosure of all written statements taken by the police from any witness.[4] The State agreed to furnish existing statements of prosecution witnesses. At the post-conviction hearing, Moore argued, and the claim is presented here, that he was denied a fair trial because six items of evidence, unknown to him at the time of the trial, were not produced and, in fact, were suppressed by the State:

A. On April 30, 1962, Sanders gave a statement to the police that he had met the man "Slick" for the first time "about six months ago" in Wanda and Del's tavern. Testimony at the post-conviction hearing by Lieutenant Turbin of the Lansing Police Department revealed that at the time of trial the police possessed an FBI report that Moore was in Leavenworth Penitentiary from 1957 to March 4, 1962. That report thus proved that Sanders could not have met Moore at Wanda and Del's in November 1961. The defense was not given a copy of the statement made by Sanders. The prosecuting attorney asserted at the post-conviction hearing that he did not recall having seen the statement before or during the trial.

---

[3] A like alibi defense was submitted at the earlier armed robbery trial of Moore and Barbee. *People* v. *Illinois*, 35 Ill. 2d, at 406, 220 N. E. 2d, at 447.

B. On the day Sanders gave his statement, that is, on April 30, the police raided Wanda and Del's looking for "Slick." "Slick" was not there, but Jones, the tavern's operator, said that he could identify "Slick." After Moore was arrested, Jones was not asked by the police whether Moore was "Slick." The defense was not advised of the raid until after the trial. At the post-conviction hearing Jones testified that Moore was not "Slick." His testimony, however, was stricken on the ground that it pertained to innocence or guilt and was not admissible upon collateral review.

C. After the raid on Wanda and Del's, the police secured from their files a picture of James E. "Slick" Watts and assigned Lieutenant Turbin the task of finding Watts. His search was unsuccessful. Moore asserts that the attempt to find Watts was not made known to the defense until cross-examination of the Lansing police chief at the post-conviction hearing.

D. After Moore was arrested on October 30, he was photographed by the police. The photograph was shown to William Leon Thompson, the patron of Wanda and Del's. Thompson testified at the post-conviction hearing that he told Lieutenant Turbin that the picture "didn't, to the best of my knowledge, resemble the man that I knew" as "Slick." He identified a picture of Watts as "the Slick I know." Defense counsel testified that through the course of the trial neither the police nor the prosecutor advised them about Thompson and his disclaimer.

E. At the start of the trial Sanders observed Moore for the first time since the alleged bragging incident at the Ponderosa Tap. Sanders remarked to the prosecuting attorney and to police officers who accompanied him into the courtroom that the person he knew as

"Slick" was about 30–40 pounds heavier than Moore and did not wear glasses. One of the officers responded, "Well, you know how the jailhouse beans are." Moore contends that he and defense counsel were not advised of this remark of Sanders until after the trial had concluded.

F. Mayer, one of the card players at Zitek's at the time of the murder, gave the police a written statement. On the back of the statement Officer Koppitz drew a sketch of the seating arrangement at the card table. The diagram shows that the corners of the table pointed north, south, east, and west. Card player Powell was placed on the southwest side. The bar was about 10 feet north of the table. The door was to the southwest. Moore argues that the diagram is exculpatory and contradicts Powell's testimony that he observed the shooting. Defense counsel testified that they were not shown the diagram during the trial.

Moore argues, as to the first five items, that the State did not comply with the general request by the defense for all written statements given by prosecution witnesses; that the State failed to produce the pre-trial statement of Sanders and the other evidence contradicting Sanders' identification of Moore as "Slick"; and that the evidence not produced was material and would have been helpful to his defense.

The Illinois court held that the State had not suppressed material evidence favorable to Moore, that the record shows that the prosecution presented its entire file to defense counsel, and that no further request for disclosure was made. 42 Ill. 2d, at 80–81, 246 N. E. 2d, at 304. Moore submits here the alternative claim that a specific request is not an "indispensable prerequisite" for the disclosure of exonerating evidence by the State and that the defense could not be expected to

make a request for specific evidence that it did not know was in existence.

In *Brady* v. *Maryland*, 373 U. S. 83 (1963), the petitioner and a companion were found guilty by a jury of first degree murder and were sentenced to death. In his summation to the jury, Brady's counsel conceded that Brady was guilty, but argued that the jury should return its verdict "without capital punishment." Prior to the trial counsel had requested that the prosecution allow him to examine the codefendant's extra-judicial statements. Some of these were produced, but another, in which the codefendant admitted the actual homicide, was withheld and did not come to Brady's notice until after his conviction. In a post-conviction proceeding the Maryland Court of Appeals held that this denied Brady due process of law, and remanded the case for retrial on the issue of punishment. This Court affirmed. It held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U. S., at 87.

The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. These are the standards by which the prosecution's conduct in Moore's case is to be measured.

Moore's counsel asked several prosecution witnesses if they had given statements to the police. Each witness (Hill, Powell, Fair) who had given a statement admitted doing so and the statement was immediately

tendered. The same inquiry was not made of witness Sanders. He was the only state witness who was not asked the question. At the post-conviction hearing the inquiry was made. Sanders admitted making a statement to the police and the statement was tendered.

The record discloses, as the Illinois court states, 42 Ill. 2d, at 80, 246 N. E. 2d, at 304, that the prosecutor at the trial submitted his entire file to the defense. The prosecutor, however, has no recollection that Sanders' statement was in the file. The statement, therefore, either was in that file and not noted by the defense or it was not in the possession of the prosecution at the trial.

We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. Here the elusive "Slick" was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore's presence at the Ponderosa were found. Unquestionably, as the State now concedes,[4] Sanders was in error when he indicated to the police that he met Moore at Wanda and Del's about six months prior to April 30, 1962. Moore's incarceration at Leavenworth until March shows that conclusion to have been an instance of mistaken identity. But the mistake was as to the identification of Moore as "Slick," not as to the presence of Moore at the Ponderosa Tap on April 27.[5]

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[4] Respondent's Brief 5; Tr. of Oral Arg. 28.

[5] The dissent observes, *post*, 5, "When confronted with this fact [Moore's imprisonment at Leavenworth], Sanders indicated that it was impossible that petitioner [Moore] was the man with whom he had spoken in the Ponderosa Tavern." This is a misreading of Sanders' testimony. The question and Sanders' answer were:

"Q. And did you tell me and also later on, did you tell the policeman from the State's Attorney's Office that if you had known that

and a second reference to trouble with a bartender in Lansing.

The other four of the first five items—that Jones told police he could identify "Slick" and subsequently testified that Moore was not "Slick"; that the police had a picture of Watts and assigned the lieutenant, unsuccessfully, to find Watts; that Thompson had been shown a picture of Moore and told the police that Moore was not "Slick"; and that on the day of the trial Sanders remarked that the man he knew as "Slick" looked heavier than Moore—are in exactly the same category. They all relate to "Slick," not Moore, and quite naturally go off on Sanders' initial misidentification of "Slick" with Moore.

None of the five items serves to impeach in any way the positive identification by Hill and by Powell of Moore as Zitek's killer, or the testimony of Fair and Joyce that Moore was at the Ponderosa Tap on April 27, or the testimony of Fair that the moustached Barbee was accompanying Moore at that time, and that one of the two men made the additional and undisputed admission on the ride to Harvey. We conclude, in the light of all the evidence, that Sanders' misidentification of Moore as Slick was not material to the issue of guilt.

The remaining claim of suppression relates to the diagram on the back of Mayer's statement to the police.[6]

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this fellow, Lyman Moore, was in the Federal Penitentiary until March 4, 1962, you would definitely not have identified him as being Slick that you knew?

"A. If he's in jail, it would have been impossible to be the same man." Typed post-conviction transcript 132–133.

[6] Contrary to the assertion by the dissent that the Mayer statement, with its accompanying diagram, was never made available to the defense, *post*, pp. 3 and 9, the trial transcript indicates that during the cross-examination of Officer Koppitz a request was made by the defense for all written statements taken by the officer from persons in Zitek's restaurant at the time of the shooting. The court

Moore contends that the diagram shows that Powell was seated with his back to the entrance to Zitek's and, thus, necessarily contradicts his testimony that he was looking toward the entrance as he sat at the card table, and that the State knowingly permitted false testimony to remain uncorrected, in violation of *Napue* v. *Illinois*, 360 U. S. 264 (1959).

In *Napue* the principal prosecution witness at Napue's murder trial was an accomplice then serving a sentence for the crime. He testified, in response to an inquiry by the prosecutor, that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration, but he did nothing to correct the witness' false testimony. This Court held that the failure of the prosecutor to correct the testimony, which he knew to be false, denied Napue due process of law, and that this was so even though the false testimony went only to the credibility of the witness. See also *Miller* v. *Pate*, 386 U. S. 1 (1967), and *Alcorta* v. *Texas*, 355 U. S. 28 (1957).

We are not persuaded that the diagram shows that Powell's testimony was false. The officer who drew the diagram testified at the post-conviction hearing that it does not indicate the direction in which Powell was facing or looking at the time of the shooting. Powell testified that his position at the table gave him a view of the bartender; that at the moment he could not bid in the pinochle game and had laid his hand down and was looking toward the door when Moore walked in. There is nothing in the diagram to indicate that Powell was looking in another direction or that it was impossible for him to see the nearby door from his seat at the card table. Furthermore, after the shooting he pursued Moore but

granted the request and the record recites that statements of Mayer and others were furnished to defense counsel.

stopped when the man warned him that he, too, might be shot.

In summary, the background presence of the elusive "Slick," while somewhat confusing, is at most an insignificant factor. The attempt to identify Moore as "Slick" encountered difficulty, but nothing served to destroy the two-witness identification of Moore as Zitek's assailant, the three-witness identification of Moore as present at the Ponderosa Tap, the two-witness identification of Moore as one of the men who requested and obtained a ride from the Ponderosa in Dolton to Harvey, Illinois, and Fair's testimony as to the admission made on that ride.

We adhere to the principles of *Brady* and *Napue*, but hold that the present record embraces no violation of those principles.

IV

The 16-gauge shotgun was admitted into evidence at the trial over the objection of the defense that it was not the murder weapon, that it had no connection with the crime charged; and that it was inadmissible under Illinois law.[7] During his closing argument to the jury, the prosecuting attorney stated that the 16-gauge shotgun was not used to kill Zitek,[8] but that Moore and his companion, Barbee, were "the kind of people that use shotguns."[9]

The Supreme Court of Illinois held that the shotgun was properly admitted into evidence as a weapon in

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[7] See n. 2.

[8] Curiously, the State argues in this Court that it is possible that the 16-gauge shotgun was the murder weapon. Brief 20–21.

[9] Later in his closing argument the prosecuting attorney referred to the 16-gauge shotgun and stated again that a 12-gauge shotgun killed Zitek. He argued that a shotgun is not "the most humane type weapon" and that the death penalty is appropriate in a case in which a shotgun is used to murder a person.

Moore's possession at the time of his arrest, and was a weapon "suitable for the commission of the crime charged . . . even though there is no evidence that it was the actual weapon used." 42 Ill. 2d, at 78, 246 N. E. 2d, at 302–303. Moore claims that the gun's introduction denied him due process.

Of course, the issue whether the shotgun was properly admitted into evidence under Illinois law is not subject to review here. The due process claim, however, appears to be raised for the first time before us. There is no claim by Moore, and there is nothing in the record to disclose, that due process was argued in the state courts. We could conclude, therefore, that the issue is not one properly presented for review.

In any event, we are unable to conclude that the shotgun's introduction deprived Moore of the due process of law guaranteed him by the Fourteenth Amendment. The 16-gauge shotgun, found in the car, was in the constructive possession of both Moore and Barbee when they were arrested after the shooting incident on October 31. There is substantial other evidence in the record that a shotgun was used to kill Zitek, and that he suffered the wounds one would expect from a shotgun fired at close range. The testimony as to the murder itself, with all the details as to the shotgun wounds, is such that we cannot say that the presentation of the shotgun was so irrelevant or so inflammatory that Moore was denied a fair trial. The case is not federally reversible on this ground.

V

Inasmuch as the Court today has ruled that the imposition of the death penalty under statutes such as those of Illinois is violative of the Eighth and Fourteenth Amendments, *Furman* v. *Georgia*, *ante*, p. ——, it is unnecessary for us to consider the claim of noncompliance

with the *Witherspoon* standards. In *Witherspoon*, 391 U. S. 522 n. 21, at 523, the Court stated specifically, "Nor, finally, does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case" (emphasis in original). The sentence of death, however, may not now be imposed.

The judgment, insofar as it imposes the death sentence, is reversed, *Furman* v. *Georgia*, *ante*, p. —, and the case is remanded for further proceedings.

SUPREME COURT OF THE UNITED STATES

No. 69–5001

Lyman A. Moore, Petitioner, v. State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[June 29, 1972]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join, concurring in part and dissenting in part.

Petitioner was convicted of murder in the Illinois state courts and sentenced to death. The Supreme Court of Illinois affirmed the conviction and sentence by a divided court. 42 Ill. 2d 73, 246 N. E. 2d 299 (1969). This Court holds that the imposition of the death sentence violated the principle established today in *Furman* v. *Georgia*, and that the sentence must be vacated, but the Court upholds the underlying conviction. I agree with the majority that the sentence is invalid and join Part V of the opinion of the Court. I also agree that the introduction of the shotgun into evidence at petitioner's trial did not violate the Fourteenth Amendment.[1]

[1] I find the constitutional question presented by the introduction of this evidence to be much harder than the majority seems to. It was uncontradicted at trial that the weapon introduced against petitioner had no bearing on the crime with which he was charged. It was, in fact, clear that the shotgun admitted into evidence was a .16 gauge gun, whereas the murder weapon was a .12 gauge gun. Despite the fact that the prosecution conceded this in a pre-trial Bill of Particulars, it did everything possible to obfuscate the fact that the weapon admitted into evidence was not the murder weapon. This was highly improper. The record also indicates that the trial judge was confused as to why he thought the weapon should be admitted. At one point he said, "There was testimony here that this was a shotgun killing. And I can see nothing wrong if they say that this defendant, who will be identified by other people, was apprehended with this gun." Abstract of Record [Abs.],

But, I believe that in failing to disclose to petitioner certain evidence that might well have been of substantial assistance to the defense, the State denied him a fair trial.

The opinion of the Court relates at some length the facts relating to the crime with which petitioner was charged, the circumstances of his arrest, the course of the trial, and the developments at the post-conviction hearing. As these facts are complicated and quite confusing, I have not reiterated them here. Rather, I have emphasized those that seem to me to be particularly important and I have added several details that are omitted from the Court's opinion

Two interrelated defenses were raised against the charge of murder—alibi and misidentification. Petitioner's theory of the case was that he was not at the scene when the murder was committed and that those witnesses who testified that they saw him there were confusing him with someone else.

Only two witnesses affirmatively asserted at trial that they saw the murder and that they could identify petitioner as the assailant. They were Patricia Hill, a waitress in the victim's bar, and Henley Powell, a customer. Aside from their testimony the only other evi-

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at 65. If the trial judge meant to imply that because the crime was committed with a shotgun, it was sufficient to prove that the petitioner possessed *any* shotgun, whether or not it was the murder weapon, he surely erred. But, it is impossible to tell from the record in this case precisely what was intended, or whether the judge confused the jury when he admitted the weapon. Although this highly prejudicial and irrelevant evidence was introduced, and although the prosecution did its best to lead the jury to believe that there was a relationship between the murder weapon and the shotgun in evidence, the fact that petitioner's counsel explained to the jury that the two weapons were not identical is, on the very closest balance, enough to warrant our finding that the jury was not improperly misled as to the nature of the evidence before it.

dence introduced against petitioner related to statements that he allegedly made two days after the murder.

There is a problem with the eyewitness testimony of Powell that did not become apparent until the post-conviction hearing in the trial court. At trial he testified as follows:

> "The defendant (indicating) came into the tavern while I was at the table. I first saw him when he walked in the door with a shotgun. I was sitting at the table along the wall. I was facing where the bartender was standing and I also had a view of the man that walked in the door. I was looking to the west." Abs. 32.

But, at the post-conviction hearing, it was discovered that police officers who had investigated the murder possessed a statement by one Charles Mayer, who had been sitting with Powell at a table in the bar, which contained a diagram indicating that Powell was seated in a direction opposite that indicated in his trial testimony. This diagram was never made available to defense counsel.[2]

Donald O'Brien, who had also been seated at Powell and Mayer's table, testified at trial and contradicted the testimony of both Powell and Patricia Hill. Although O'Brien admitted that he did not actually see the shooting because his back was to the bar, he was certain that petitioner was not the man who had been ejected from the victim's bar only an hour before the killing. O'Brien's testimony greatly undercut the ap-

[2] It is true, as the Court states, that following the shooting Powell followed the assailant into the street, but it is also true that he never got closer than 50 to 60 feet of the murderer. Abs. 32. The strength of his testimony lay in the alleged opportunity he had for close observation of the murderer while the crime was committed. Footnote 6 of the Court's opinion implies that during the trial the

parent retaliatory motive that the prosecution attributed to petitioner.[3]

Because of the contradictory testimony of those persons who were present at the scene of the murder, the statements allegedly made by the petitioner after the crime were crucial to the prosecution's case. The key prosecution witness in this regard was Virgle Sanders. He testified that two days after the murder he was in the Ponderosa Tavern, that petitioner (whom he knew as "Slick") was there also, and that petitioner said "something about its season or open season on bartenders or something like that." Abs. 44. The bartender also testified that he recognized petitioner as being present at the same time as Sanders. And the owner of the tavern stated that he gave petitioner and petitioner's friend a short ride in his automobile at the end of which

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prosecution turned over Mayer's diagram to defense counsel. But, there is absolutely no support for this implication in the record. While it is true that the diagram was drawn on the back of the original statement given by Mayer to the police, there is nothing to indicate that it was ever recopied and made a part of any reproductions of Mayer's statement. All indications are that it was not reproduced. At the post-conviction hearing the following testimony was adduced: the police officer who aided the prosecution at trial indicated that he had the original diagram in *his file*, Abs. 244-249; the two lawyers who had represented petitioner at trial both swore that they were given only Mayer's statement, not his diagram, Abs. 307, 328; and the prosecutor testified that he did not know for sure whether he gave the diagram to defense counsel, but that it was certain that he did not supply the diagram if it was not in his file. Abs. 324. Since the diagram was in the police officer's file, not the prosecutor's, it is clear that it was never made available to defense counsel, even though the prosecutor was aware of its contents. See p. —, *infra*.

[3] The Court asserts that O'Brien may have been drunk. His testimony at trial made it clear beyond doubt that when the victim ejected the man alleged to be the petitioner from the bar, this witness was perfectly sober. Later, especially after the killing, the witness drank heavily and became intoxicated. No one contradicted this at trial.

the friend mentioned something about "trouble with the bartender." Abs. 52.

After his trial and conviction petitioner learned that five days after the murder, Sanders gave a statement to the police in which he said that he had met "Slick" for the first time about six months before he spoke to him in the Ponderosa Tavern. As the Court notes, it would have been impossible for Sanders to have met the petitioner at the time specified, because petitioner was in federal prison at that time. At the post-conviction hearing, Sanders said that he was not positive when he first met the man known as "Slick," but that he definitely knew it was before Christmas, 1961. Petitioner was not released from federal custody until March 1962. When confronted with this fact, Sanders indicated that it was impossible that petitioner was the man with whom he had spoken in the Ponderosa Tavern. App. 295. Sanders' trial identification was further impeached at the post-trial hearing by testimony that on the day of trial he told police officers that petitioner was approximately 30 or 40 pounds lighter than he remembered "Slick" being. Abs. 294.

Sanders' testimony that petitioner and "Slick" were not one and the same was corroborated at the hearing. The reason that Sanders could remember the first time that he had met "Slick" was that "Slick" had been involved in a scuffle with one William Thompson. Thompson testified at the hearing that he remembered the altercation, that he knew "Slick," that prior to the trial he had told police officers that petitioner was not "Slick," and that he remained certain that petitioner and "Slick" were different people. Finally, Sanders' testimony was corroborated by Delbert Jones, the owner of the tavern where "Slick" and Thompson scuffled. Jones testified that he was certain that petitioner was not the man known as "Slick."

The fact is that Thompson and Jones were both familiar with one James E. Watts, whom they knew as "Slick," and who looked very much like the petitioner. The record makes clear that the police suspected Watts as the murderer and assigned a lieutenant to search for him. A raid of Jones' bar was even made in the hopes of finding this suspect.

Sanders' testimony at the post-convention hearing indicates that it was Watts who bragged about the murder, not petitioner. It is true that the bartender and the owner of the Ponderosa Tavern testified at trial that it was petitioner who was in the bar with Sanders, but the bartender had never seen "Slick" before, and the owner was drinking the entire afternoon. Furthermore, the fact remains that petitioner and Watts look very much alike.

Petitioner urges that when the State did not reveal to him Sanders' statement about meeting "Slick" at an earlier time and the corroborative statements of Thompson and Jones, it denied him due process. The Court answers this by saying that the statements were not material. It is evident from the foregoing that the statements were not merely material to the defense; they were absolutely critical. I find myself in complete agreement with Justice Schaeffer's dissent in the Illinois Supreme Court:

> "The defendant's conviction rests entirely upon identification testimony. The facts developed at the post-conviction hearing seriously impeached, if indeed they did not destroy, Sanders's trial testimony. Had those facts, and the identifications of 'Slick' Watts by Thompson and Jones, been available at the trial, the jury may well have been unwilling to convict upon the identifications of Patricia Hill and Henry Powell. Far more is involved in

this case, in my opinion, than 'the following up of useless leads and discussions with immaterial witnesses.' Certainly if Sanders's identification was material, the . . . testimony of the other witnesses which destroyed that identification was also material. Consequently, I believe that the State's nondisclosure denied the defendant the fundamental fairness guaranteed by the Constitution. . . ." 42 Ill. 2d, at 88–89, 246 N. E. 2d, at 308.[4]

Petitioner also urges that the failure of the prosecution to disclose the information concerning where the eyewitness Powell was sitting when he allegedly saw petitioner is another instance of suppression of evidence in violation of the Fourteenth Amendment. Had this been the prosecution's only error, I would join the Court in finding the evidence to be immaterial. But if this evidence is considered together with other evidence that was suppressed, it must be apparent that the failure

[4] Chief Judge Friendly has noted that when the prosecution fails to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention, "almost by definition the evidence is highly material." *United States* v. *Keogh*, 391 F. 2d 138, 147 (CA2 1968). See also *United States ex rel. Meers* v. *Wilkins*, 326 F. 2d 135 (CA2 1964).

The materiality of the undisclosed evidence in this case cannot be seriously doubted. The State based its case primarily on the eyewitness identifications of petitioner by a witness and patron in the bar. Testimony of this sort based on in-court identification is often viewed with suspicion by juries. See McGowan, Constitutional Interpretation and Criminal Identification, 12 William & Mary L. Rev. 235, 241–242 (1970). That testimony in this case was subject to serious question: indeed, petitioner premised his defense in large part on a theory of misidentification. Coupled with the contradictory statement made by O'Brien (see *supra*, p. —), the evidence showing that one of the witnesses may not have had an adequate opportunity to observe and that petitioner may have been confused with another person named "Slick" would certainly have been material to the defense's presentation of its case.

of the prosecution to disclose it contributed to the denial of due process.

Even if material exculpatory evidence was not made available to petitioner, the State argues that because petitioner did not demand to see the evidence, he cannot now complain about nondisclosure. This argument is disingenuous, at best.

Prior to trial petitioner moved for discovery of all statements given to the prosecutor or the police by any witness possessing information relevant to the case. Abs. 5. In explaining why such a broad motion was made, petitioner's counsel stated that "[w]e want to circumvent the possibility that a witness gets on the stand and says, 'Yes, I made a written statement,' and then the State's Attorney says, 'But no, we don't have it in our possession,' or they say, 'It's in the possession of Orlando Wilson [Superintendent of Police, Chicago, Ill.], or 'The Chief of Police of Lansing.'" Abs. 8. In response to the motion, the prosecutor guaranteed defense counsel and the court that he would supply defense counsel with statements made either to the police or to the State's attorney by witnesses who were called to testify at trial. *Ibid.* Based on this representation, the motion for discovery was denied. Never was there any implication by the prosecutor that his guarantee was in any way dependent upon petitioner's making repeated and specific requests for such statements after each witness testified at trial. The prosecutor's guarantee certainly covered Sanders' statement. As for the statements of the bartender and owner of the Ponderosa Tavern and the statement and diagram of Charles Mayer, petitioner clearly demanded to see these things before trial. The prosecution took the position that it was bound to reveal only the statements of witnesses who testified. Hence, it is hard to imagine what sort of further demand petitioner might have made. Moreover, the very fact that petitioner made his motion for ex-

tensive discovery placed the prosecution on notice that the defense wished to see all statements by any witness that might be exculpatory. The motion served "the valuable office of flagging the importance of the evidence for the defense and thus impos[ing] on the prosecutor a duty to make a careful check of his files." *United States* v. *Keough*, 391 F. 2d 138 (CA2 1968).

In my view, both *Brady* v. *Maryland*, 373 U. S. 83 (1963), and *Napue* v. *Illinois*, 360 U. S. 264 (1959), require that the conviction in this case be reversed. *Napue* establishes that the Fourteenth Amendment is violated "when the State, although not soliciting false evidence, allows it to go uncorrected." And *Brady* holds that suppression of material evidence requires a new trial "irrespective of the good faith or bad faith of the prosecution." There can be no doubt that there was suppression of evidence by the State and that the evidence that the State relied on was "false" in the sense that it was incomplete and misleading.

Both before and during the trial the prosecutor met with Sanders and went over the statement that he had given the police five days after the murder. Abs. 301, 315. Thus, it is apparent that the prosecutor not only knew of the statement, but was actively using it to prepare his case. There was also testimony at the post-conviction hearing from the prosecution that it had discussed the location where Powell was sitting when he allegedly saw the murder. While the prosecutor could not remember whether or not he actually had Mayer's statement and diagram in his possession, he had some recollection that before trial he was informed of exactly where everyone at Powell's table was sitting. App. 323. No attempt was ever made at trial to communicate this information to the defense.

Moreover, seated at the prosecutor's table throughout the trial was police Lieutenant Turbin, who had investi-

gated the case and who was assisting the prosecution. At the post-conviction hearing, he testified that throughout the trial he was not only aware of Sanders' statement and Mayer's diagram, but also that he had them in his file. He made no attempt to communicate his information to the prosecutor or to remind him about the evidence.

When the State possesses information that might well exonerate a defendant in a criminal case, it has an affirmative duty to disclose that information. While frivolous information and useless leads can be ignored, if evidence is clearly relevant and helpful to the defense, it must be disclosed.

Obviously some burden is placed on the shoulders of the prosecutor when he is required to be responsible for those persons who are directly assisting him in bringing an accused to justice. But this burden is the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair. "A citizen has the right to expect fair dealing from his government, see *Vitarelli* v. *Seaton*, 359 U. S. 535, and this entails . . . treating the government as a unit rather than as an amalgam of separate entities." "The prosecutor's office is as entity and as such it is the spokesman for the Government." *Giglio* v. *United States*, — U. S. —, — (1972). *S & E Contractors, Inc.* v. *United States*, — U. S. —, — (1972). See also *Santobello* v. *New York*, — U. S. —, — (1971); *Barker* v. *Wingo*, — U. S. — (1972).

My reading of the case leads me to conclude that the prosecutor knew that evidence existed that might help

[5] In the recent decision in *Kastigar* v. *United States*, — U. S. — (1972), holding that use immunity was co-extensive with the Fifth Amendment privilege against self incrimination, the Court noted that prosecutors may be responsible for actions of police officers enlisted to aid a prosecution.

the defense, that the defense had asked to see it, and that it was never disclosed. It makes no difference whatever that the evidence that was suppressed was found in the file of a police officer who directly aided the prosecution or in the file of the prosecutor himself. When the prosecutor consciously uses police officers as part of the prosecutorial team, those officers may not conceal evidence that the prosecutor himself would have a duty to disclose. It would be unconscionable to permit a prosecutor to adduce evidence demonstrating guilt without also requiring that he bear the responsibility of producing all known and relevant evidence tending to show innocence.